91-633

No. ———

In the Supreme Court of the United States

OCTOBER TERM, 1991

PRINCIPAL FINANCIAL GROUP, a/k/a or d/b/a
PRINCIPAL MUTUAL LIFE INSURANCE COMPANY,
PETITIONER,

v.

BARBARA CAROLINE THOMAS, RESPONDENT.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Due Process Clause is violated by a punitive damages award of $750,000 that (1) is 750 times the compensatory damages of $1,000, (2) is imposed for conduct that was not fraudulent, oppressive, or foreseeably wrongful, nor part of any pattern or practice of wrongdoing, (3) greatly exceeds any profit petitioner could conceivably have gained from the challenged conduct, (4) is wholly out of line with analogous criminal and civil penalties set by legislatures in Alabama and other states for such conduct, and (5) results from a trial in which highly inflammatory evidence was introduced that was extremely prejudicial to petitioner and completely irrelevant to any contested issue in the case.

2. Whether the due process requirement of fair notice is violated by the retroactive imposition of punitive damages for conduct that was not identifiably wrongful at the time it was undertaken and was not determined to be wrongful until the very case in which the punitive damages award was made.

RULE 29.1 STATEMENT

Principal Financial Group and Principal Mutual Life Insurance Company have no parent corporations and no non-wholly-owned subsidiaries.

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Principal Financial Group, a/k/a or d/b/a Principal Mutual Life Insurance Company ("Principal"), respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Alabama in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama upholding the amount of the punitive damages award (App. A, *infra*, 1a-13a) is not yet reported. The opinion of the Circuit Court of Mobile County denying a new trial or remittitur on remand from the Alabama Supreme Court (App. B, *infra*, 14a-27a) is unreported. The original decision of the Alabama Supreme Court ruling against petitioner on liability and remanding the case to the trial court to pass upon the issue of excessiveness of punitive damages (App. C, *infra*, 28a-65a) is reported at 566 So. 2d 735. The original order of the trial court granting

Principal's motion for judgment notwithstanding the verdict on the bad-faith insurance claim on which punitive damages were based (App. D, *infra*, 66a) is unreported. Principal's application for a stay was denied by the Alabama Supreme Court on August 9, 1991 (App. E, *infra*, 67a-68a) and by Justice Kennedy acting as Circuit Justice on August 16, 1991 (App. F, *infra*, 69a).

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on July 26, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATEMENT

This is an extreme example of a continuing line of decisions in which the Alabama Supreme Court has upheld an award of punitive damages against an insurance company based upon a claim of the company's "bad faith" failure to pay benefits. Here, although there was no fraud, oppression, or conscious wrongdoing of any kind, the punitive damages award of $750,000 was *750 times* the total compensatory damages of $1,000. Such an award far exceeds any amount that could be considered reasonably necessary to further the State's goals of deterrence and just retribution and thus violates the Due Process Clause as interpreted by this Court in *Pacific Mutual Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032 (1991). As evidenced by this and other decisions, *Haslip* has failed to stem the tide of unwarranted punitive damages awards by providing meaningful judicial standards for overseeing juries' largely unlimited discretion in determining the amount of punitive damages.

Furthermore, the so-called "bad faith" underlying the punitive damages awarded here involved conduct that petioner did not know, and *could not have known*, was wrongful at the time it was engaged in and indeed had never been declared to be even a breach of contract under

Alabama insurance law—let alone a bad-faith tort—until the Alabama Supreme Court's decision in this very case. Such a retroactive imposition of punitive damages is a palpable violation of the settled due process requirement of "fair notice." This Court's review is necessary to ensure state-court compliance with this constitutional standard in the important and recurring context of punitive damages.

A. The Insurance Claim

The $750,000 punitive damages award in this case grows out of a dispute over the interpretation of a provision in an employer-provided group life insurance policy issued by Principal to the University of South Alabama Medical Center ("University"), the employer of respondent Barbara Caroline Thomas. The policy provided a $1,000 death benefit for employees' dependents if they were (1) less than 19 years of age, or (2) between 19 and 25, unmarried, and attending school on a full-time basis. In relevant part, the policy defined "dependent" as follows:

> The word "Dependent" shall also mean each unmarried child who is nineteen years but less than twenty-five years of age provided he is attending school on a full-time basis and is dependent upon the Person for his principal support and maintenance. School vacation periods during any calendar year which interrupt but do not terminate what otherwise would have been a continuous course of study in that calendar year shall be considered a part of school attendance on a full-time basis.

App., *infra*, 29a-30a.

In July 1984, respondent's 21-year-old daughter, Melinda Warren, enrolled in a 1200-hour work-study cosmetology course at the Mobile Academy of Hair Design. App., *infra*, 30a. Warren was stricken with cancer, and by September 1985 her illness prevented her from attending classes. Warren never returned to school and died in

March 1987. *Ibid.* At the time of her death, Warren was unmarried, 24 years old, and dependent upon respondent for her principal support and maintenance. *Ibid.*

After Warren's death, Thomas, through the University, filed a claim for the $1,000 benefit under the group policy's dependent provision. At Principal's request, the University contacted the Mobile Academy of Hair Design, where Warren had been a student. Betty Jo Tanner, the owner of the Academy, informed the University that Warren had previously attended the school but had not been on the roll since September 1985; Tanner stated that Warren had not been in school since that date because of her illness, that she had been in and out of the hospital over the last two years, and that she had been bedridden for the six months prior to her death. The University conveyed this information to JoAnn Robbins, a claims examiner for Principal. App., *infra*, 30a.

Based on this information, Robbins determined that Warren was not a "dependent" as defined in the insurance policy because she was not attending school on a full-time basis when she died and had not done so for the previous 18 months. Accordingly, Robbins recommended that Thomas's claim be denied. This recommendation was reviewed and approved by Robbins's supervisor, Pam Davis, and then by Davis's supervisor, Mike Wallace. In a letter to the University, Principal stated that it denied Thomas's claim because Warren had not been attending school on a full-time basis and therefore was not a "dependent" at the time of her death. App., *infra*, 31a-32a.[1]

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[1] Principal's letter explained (App., *infra*, 31a-32a):

> According to the information we have received from your office, Melinda Warren was last on the role [sic] at school through September, 1985. She then became disabled and died on March 10, 1987. From September, 1985, through her demise she was not attending school on a full-time basis. Therefore, effective September, 1985, she would not meet the definition of a dependent as defined in the group policy and would not be eligible for dependent life insurance. Since she was not considered a

At Thomas's request, Principal reconsidered its decision. Robbins reevaluated the claim and again recommended denial because she concluded that Warren did not meet the conditions of eligibility for a "dependent." App., *infra*, 32a. Davis agreed with this recommendation, and it was confirmed by Nancy Ford, a claims examiner at Principal, and Merle Kaplan, the senior claims consultant, on the ground that there was "[n]o contractual basis for continuance of coverage to the date of death." *Ibid.* Principal then notified Thomas that it adhered to the denial of the claim. *Ibid.*

The University—which provided the group life insurance program and had selected the language of the policy—reviewed Principal's denial of Thomas's claim to decide whether "to accept the decision * * * or challenge it." CR 683. Ted Ferguson, Personnel Director of the University, stated that he was "not aware of any employee or dependent who has been continued on health insurance beyond their eligibility because they became ill when they were eligible." CR 687. Accordingly, he concluded that "Ms. Warren was clearly not an eligible dependent when she died and I cannot support an appeal of the death claim." *Ibid.* The University then notified Thomas that it had "reviewed the claim and understands [petitioner's] contractual basis for denying the claim." CR 688.

B. The Proceedings Below

1. *The Trial.* Thomas sued Principal in the Circuit Court of Mobile County. She sought compensatory damages for the alleged breach of the insurance contract and punitive damages for the alleged tort of bad-faith refusal to pay insurance benefits. Following trial, the jury awarded Thomas $1,000 in compensatory damages on the

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dependent at the time of her demise, dependent life insurance benefits are not payable on this claim.

contract count and $750,000 in punitive damages on the bad-faith tort count. App., *infra*, 29a.[2]

The trial court granted Principal's motion for judgment notwithstanding the verdict on the bad-faith claim. As a result, the award of punitive damages was vacated.

2. *The First Appeal.* On cross-appeals, the Alabama Supreme Court upheld the jury verdict on the breach-of-contract claim and reversed the grant of j.n.o.v. on the bad-faith claim. App., *infra*, 29a. It agreed with the trial court that "as a matter of law * * *, under certain clear language of the policy, Ms. Warren's status as a 'dependent' was to be determined as of the date of her death." *Id.* at 34a. The court also noted that the controlling "words 'attending school on a full-time basis' are not patently ambiguous; that is, on their face they are clear and intelligible and suggest but a single meaning. * * * Thus, the words 'attending school on a full-time basis,' at least on their face, envision presence in school for the normal or standard period of time required." *Id.* at 35a. Accordingly, the court recognized that

> [i]f this were the end of our inquiry, we would be compelled to hold [for Principal on the breach-of-contract claim] * * * because the undisputed evidence showed that Ms. Warren was not attending school at the Mobile Academy at the time of her death and had not been doing so for approximately 18 months prior thereto.

Ibid.

Nevertheless, viewing the evidence in the light most favorable to the jury's verdict for Thomas, the Alabama Supreme Court concluded that "the policy language does

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[2] The trial court instructed the jury that it was to return a verdict of $1,000 in compensatory damages if it found for respondent on the contract claim, and that it was to determine for itself the amount of any punitive damages it awarded on the bad-faith tort claim. See RT 452-454, 463-464. The verdict forms reflected these instructions. See CR 384-385.

suffer from a latent ambiguity" because "some extrinsic fact or extraneous evidence creates a necessity for interpretation or a choice among two or more possible meanings." App., *infra*, 35a. In finding a latent ambiguity, the court reasoned that "each claim submitted to Principal Mutual was reviewed on a case-by-case basis"; that "policy language was not always interpreted literally"; that Principal's claims manual provided that " '[a]ll policy provisions shall be interpreted in accordance with the common understanding of their language' " and that " '[t]he spirit or intent of the provision as distinguished from a narrow interpretation of the language shall be given effect' "; that respondent's expert witness testified that Warren "would have been considered a 'dependent' within the meaning of the policy by all other insurers within the industry because she was rendered physically incapable of attending school"; and that Principal's employees Robbins and Wallace "seemed confused as to exactly what the policy language meant." *Id.* at 36a-37a. Accordingly, the court held that "the trial court did not err in allowing the jury to determine whether Ms. Warren was 'attending school on a full-time basis' and, thus, whether she was a 'dependent' at the time of her death." *Id.* at 38a.

Having concluded that Principal had breached the insurance contract by failing to resolve in respondent's favor the "latent ambiguity" in the policy language, the Alabama Supreme Court went on to hold that this failure could be found to constitute bad faith. It reached that result despite the fact that the interpretation of the dependents' insurance provision in the contract was an issue of first impression in Alabama and that courts in other states had ruled that students in comparable circumstances were *not* "dependents" for insurance purposes. See page 25 note 9, *infra*. The court also brushed aside its own acknowledgment that the facially unambiguous policy language supported Principal's position and that the latent ambiguity in the dependents'

provision at most presented a question for the jury. Instead, relying on the same factors it had cited in connection with the contract claim, the court held that Principal's rejection of respondent's claim constituted not just a breach of contract but a bad-faith tort. App., *infra*, 55a, 58a-60a.

Justice Maddox dissented from the reinstatement of the jury's verdict on the bad-faith claim. As he explained:

> [The majority improperly] authorizes the recovery of punitive damages against an insurer for failing to pay a claim that was seriously disputed, the validity of which has only *finally been determined today in this appeal.* * * * * I cannot accept the conclusion of the majority that this case "falls within the category of an unusual or extraordinary case." In my opinion, this case is no different from an ordinary case in which there is a dispute about insurance coverage. Because of that fact, I am convinced that the plaintiff should not be permitted to recover punitive damages in any amount, and certainly not in the sum of $750,000.

App., *infra*, 62a, 64a (emphasis in original). To uphold a punitive award in the absence of fair warning that the denial of benefits was wrongful, Justice Maddox stated, "effectively allows for the recovery of punitive damages against an insurer without affording the insurer due process of law." *Id.* at 62a-63a.

3. *The Remand Proceeding.* Because it had set aside the jury verdict on the underlying bad-faith claim, the trial court had not addressed Principal's contention that the jury's $750,000 punitive damages award was excessive. In view of its reversal of the grant of j.n.o.v. on that count, the Alabama Supreme Court remanded the case to the trial court for consideration of the excessiveness issue. App., *infra*, 61a. The trial court denied relief, emphasizing that the punitive damages award would "not impose economic hardship" on Principal in light of its assets and profits. App., *infra*, 23a.

4. *The Second Appeal.* On Principal's appeal challenging the punitive damages award as a violation of Alabama law and the federal Due Process Clause, the Alabama Supreme Court affirmed. App., *infra*, 1a-13a. The court recognized that there was "no evidence" that Principal had engaged in a "pattern or practice" of bad-faith refusals "to pay any borderline claims involving small amounts." *Id.* at 3a. Nonetheless, it concluded that the harm to respondent from denial of her claim was "grievous," largely for the reason that "parents should not have to bury their children." *Id.* at 2a. The court also relied on the *small* amount of respondent's actual injury as justification for the *large* award of punitive damages; it noted that the out-of-pocket expenses of respondent's attorneys were $9,330.33 at the time of the remand proceedings before the trial court, and stated that "a lack of a means of litigating because the contract amount involved is too small to obtain lawyers * * * would potentially deprive an insured, who thinks her case is just, of her day in court." *Id.* at 3a. In addition, the court believed that Principal's "intentional[] and reckless[]" conduct was "moderately reprehensible." *Ibid.* Finally, it observed that the award "much more than removes the profit in this case" (*id.* at 4a) but would " 'not impose economic hardship' " on Principal. *Ibid.* For these reasons, the court held that the punitive award was not excessive.

Three justices, specially concurring, recognized that the 750:1 ratio of punitive to compensatory damages substantially exceeded the ratio that this Court found close to the constitutional line in *Haslip*. Despite that, they concluded that due process does not require "some kind of proportionality between compensatory and punitive damages * * * if the jury is charged as it was in *Haslip* and if the trial court conducts a hearing in accordance with *Hammond* v. *City of Gadsden*, 493 So. 2d 1374 (Ala. 1986), evaluates the case by the seven factors listed in *Green Oil Co.* v. *Hornsby*, 539 So. 2d 218 (Ala. 1989),

and if this Court conducts an appropriate review." App., *infra*, 8a. These justices suggested dealing with the enormous size of respondent's windfall by reducing the amount that she would receive "to some figure more closely corresponding to the 200 to 1 punitive damages to out-of-pocket expenses ratio that existed in *Haslip*" (*Ibid.*), with the remainder to be deposited in the State's general fund.

Justice Maddox again dissented. He observed that Principal was "being fined for failing to win the legal debate over whether the policy language was ambiguous, a legal issue the record in this case shows was involved in this case from the beginning" (App., *infra*, 9a); indeed, "it was a close question whether the company was entitled to a directed verdict on the contract claim," and the trial court, "applying the law of bad faith extant at the time, * * * granted the company's motion for a judgment notwithstanding the verdict." *Id.* at 9a, 10a. Because the question "[w]hether the company had a 'lawful basis' to deny the claim" was "a debatable issue from the very start" and was "not determined until th[e] Court['s] first opinion in this case," the Alabama Supreme Court's affirmance of the punitive damages rested on a "change[] [in] the rules" that "was not established until th[e] Court heard the case on appeal." *Id.* at 11a, 12a.

REASONS FOR GRANTING THE PETITION

In recent years this Court has often visited—and as often expressed its concern about—the problem of "punitive damages that 'run wild.'" *Pacific Mutual Life Ins. Co.* v. *Haslip*, 111 S. Ct. 1032, 1043 (1991). It is evident that the Court believed that its decision in *Haslip* not only would lead to an evaluation of the constitutionality of other states' procedures for awarding punitive damages, but also would initiate a meaningful process of rational post-verdict review of large punitive damages awards by the state and lower federal courts, which

would flesh out the substantive due process standards that were outlined in *Haslip*. It is equally evident, however, that nothing of this sort is in fact occurring. At most, the lower courts have paid lip service to the process of rational, structured review while often (as here) emptying the elements of that review of meaningful content.

This case offers the Court an excellent opportunity to provide more meaningful and much needed guidance for the excessiveness inquiry. Even though Principal's denial of respondent's claim was based upon a concededly plausible interpretation of the insurance contract, the Alabama Supreme Court sustained a punitive verdict that was *750 times* respondent's actual damages. If the principle that there must be some rational relationship between the amount of punitive damages and the State's purposes in exacting such punishment means anything, it was surely violated in this case. And the "justification" for the award offered by the Alabama Supreme Court—allowing the punitive damages against Principal to be based on the tragedy of Ms. Warren's cancer and proclaiming that the *small* size of the actual injury itself sustains *large* punitive damages—constitutes nothing short of a total abdication of its constitutional duty to review such awards for excessiveness under rational and objective standards.

As one of the Justices of the Alabama Supreme Court noted recently in dissenting from the denial of a stay in a similar excessiveness case:

> The *Hammond* and *Green Oil Co.* procedure seems not to be working.
>
> It is frequently said that persons should rely more on what a person *does* than upon what he *says*. What this Court has *done*, especially since *Haslip* was released, shows that the procedure found in *Haslip* to be meaningful and adequate may not be.

* * * * *

> I think that the Supreme Court of the United States may have been led to believe that a type of "independent review" was occurring, when in fact it was not, and is not, occurring.

Southern Life & Health Ins. Co. v. *Turner*, No. 88-1289, slip op. 2, 4 (Ala. Sept. 11, 1991) (Maddox, J., dissenting) (citation omitted). It is time for this Court to define with greater clarity the contours of due process excessiveness review of punitive damages awards.

I. THE ALABAMA SUPREME COURT'S DISREGARD OF *HASLIP*'S DUE PROCESS EXCESSIVENESS STANDARD PRESENTS AN IMPORTANT AND RECURRING ISSUE THAT WARRANTS THIS COURT'S REVIEW

A. This Court's Review Of The Excessiveness Issue Is Urgently Needed

1. In *Haslip*, this Court addressed the problem of excessive punitive damages awards by making clear that the federal Constitution establishes bounds on the amount of punishment that can be meted out by the trier of fact in a particular case. As the Court explained, substantive due process requires that there be a "rational relationship" between the amount awarded and the deterrent and retributive objectives of punitive damages to ensure that the "particular award" not be "greater than reasonably necessary to punish and deter." 111 S. Ct. at 1045-1046. Under this standard, punitive damages are unconstitutionally excessive if they are "grossly out of proportion to the severity of the offense" or lack "some understandable relationship to compensatory damages." *Id.* at 1045. Applying this test, the Court concluded that the $840,000 punitive damages award in *Haslip*—which was "more than 4 times the amount of compensatory damages"—was "close to the line" but did "not cross the line into the area of constitutional impropriety." *Id.* at 1046.[3]

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[3] The Court in *Haslip* also held that Alabama's procedures for awarding punitive damages meet procedural due process minima. Although there is reason to doubt that Alabama in fact adheres to

Unfortunately, it already is evident that *Haslip* has failed to restrain excessive punitive damages awards. In the present case, three justices of the Alabama Supreme Court expressly denied "that there must be some kind of proportionality between compensatory damages and punitive damages." App., *infra*, 8a (Houston, J., concurring specially). And decisions in cases like this one and *Southern Life & Health Ins. Co.* v. *Turner*, No. 88-1289, slip op. (Ala. Aug. 23, 1991) ($500,000 punitive award upheld where plaintiff's injury required $1,000 to be remedied), make it clear that the Alabama Supreme Court essentially ignores the ratio between punitive and compensatory damages in conducting its excessiveness review and gives little serious attention to other relevant elements. Other courts similarly have read the substantive due process requirement out of *Haslip*, holding that the federal Constitution is met if procedural due process is satisfied. See, *e.g.*, *Oberg* v. *Honda Motor Co.*, 814 P.2d 517 (Or. Ct. App. 1991) (upholding $5 million punitive damages award under Due Process Clause even though state courts have no power to review jury verdicts for excessiveness).

Beyond that, even courts that purport to recognize a substantive component of *Haslip* have either distorted or evaded the controlling standard. In this case, for example, as we discuss in more detail below, the Alabama Supreme Court upheld a $750,000 punitive damages award that, under any rational understanding of *Haslip*, plainly is excessive. Such a decision, while paying lip service to *Haslip*, reaches an outcome that renders substantive excessive review a virtual dead letter.[4] Given such a read-

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these procedures (see note 4, *infra*), we do not challenge that aspect of the decision below.

[4] We also note that just four days after *Haslip*, the Alabama Supreme Court made clear that, contrary to this Court's understanding (see 111 S. Ct. at 1044-1045 & n.10), Alabama law does not provide independent judicial review of juries' punitive damages awards but instead embodies a "presumption of correctness of the jury verdict." *Armstrong* v. *Roger's Outdoor Sports, Inc.*, 581 So. 2d

ing of *Haslip*, it should come as no surprise that exorbitant punitive damages awards have continued unabated. See, *e.g.*, *The Narrows* v. *Gotham Ins. Co.*, No. 3AN89-9272-Civil, slip op. (Alaska Super. Ct. 1991) (appeal docketed Nos. S-4388 & 4723) ($60 million punitive damages award returned by jury and upheld by trial court; awarded for delay in reviewing claim under $280,000 insurance policy); see also *Eichenseer* v. *Reserve Life Ins. Co.*, 934 F.2d 1377 (5th Cir. 1991) (upholding $500,000 punitive damages award that was 500 times the compensatory damages).

2. As the post-*Haslip* cases attest, it is inevitable that this Court will be required to return to the due process excessiveness issue sooner or later. For the reasons that follow, we submit that it should be sooner.

Ultimately, the delineation of the constitutional standard appears likely to develop in common-law fashion over a series of decisions involving a continuing interplay between this Court and the lower courts. The untoward effects of excessive punitive damages will abate only gradually, as this process evolves. It is vitally important that the process of change—if, indeed, this Court finds such change constitutionally required—not be delayed. That process will not move forward until this Court makes clear that the constitutional standard is not toothless; this will require the reversal of some punitive award. The present case provides an ideal vehicle for the Court to elaborate the controlling constitutional principles.

414, 421 (Ala. 1991). This conclusive interpretation of state law negates the essential premise of *Haslip*. See *Armstrong*, 581 So. 2d at 423 (Maddox, J., dissenting) ("the *Hammond* and *Green Oil Co.* procedures do not provide for an *independent review* of punitive damages awards, and * * * the procedure the Supreme Court of the United States has just found 'ensures meaningful and adequate review * * *' is neither meaningful nor adequate to protect a defendant's 'due process' rights"); *Southern Life & Health Ins. Co.* v. *Turner*, No. 88-1289, slip op. 15 (Ala. Aug. 23, 1991) (Maddox, J., concurring) ("[p]ost-*Haslip* reviews by this Court, including this one, indicate that the procedures, when actually applied, are not adequate and meaningful").

The Court has often heard the reasons why the existing system of punitive damages, and especially its tendency to produce excessive punishment, impairs the functioning of the Nation's economy—and has often expressed those concerns itself. We do not propose to repeat these arguments, but we do believe a few points are especially relevant to the decision whether to address the excessiveness issue now, and in this insurance bad-faith case.

The President's Council on Competitiveness, under the chairmanship of Solicitor General Kenneth A. Starr, recently concluded that the current punitive damages system "generate[s] disproportionately high awards in a random and capricious manner." Report of the President's Council on Competitiveness, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 22 (Aug. 1991). See also *id.* at 5, 8. This lottery system of large punitive damages awards has severe consequences for our nation's economy. The President's Council noted that "[u]nrestrained litigation necessarily exacts a terrible toll on the U.S. economy" and has "baleful effects" in both domestic and international markets. *Id.* at 1. For example, "foreign competitors often have product liability insurance costs that are 20 to 50 times lower than U.S. companies." *Id.* at 3. Likewise, concerns over liability have led companies to withdraw a number of products, discontinue product research, and lay off workers. *Ibid.* See also, *e.g.*, *Browning-Ferris Indus.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 282-283 (1989) (O'Connor, J., concurring in part and dissenting in part).

These problems are particularly pronounced in business litigation and specifically in bad-faith insurance cases like the present one. An American Law Institute study documents that "most of the growth in punitive damages * * * [has been] in intentional torts and business contract disputes, including wrongful dismissal, insurer bad faith, and other commercial litigation." II American Law Institute, Reporters' Study, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: APPROACHES TO LEGAL AND IN-

STITUTIONAL CHANGE 234 (1991). As one observer summarized the recent trend, "[j]urors are angry, and they seem to be taking it out on insurance companies in the form of punitive damages." Blum, *Angry Jurors Take It Out on Insurers*, NATIONAL LAW JOURNAL, May 13, 1991, at 1. See also, *e.g.*, Comment, *Bad-Faith Denial of Insurance Claims: Whose Faith, Whose Punishment? An Examination of Punitive Damages and Vicarious Liability*, 65 TUL. L. REV. 395 (1990).

This explosion in punitive damages adversely affects not only corporate defendants and their shareholders and employees (who typically had no involvement in any wrongdoing but nonetheless must bear the burden of the punishment) but also innocent consumers of the defendant's products or services. Disproportionate penalties overdeter and thereby discourage socially desirable behavior. See Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 ALA. L. REV. 831, 858-860 (1989).

With particular regard to insurance claims, an enormous exaction such as that at issue here will not simply induce Principal and other insurance companies to pay valid claims; it will go much further, pressuring them to accept every debatable claim and many invalid ones for fear that any erroneous denial would have catastrophic consequences. This pressure to pay dubious claims inevitably will increase the risks associated with writing insurance in Alabama and other states, causing underwriters to raise premiums to match the more costly claims history. In this way, the cost of excessive punitive damages will be paid in large part by innocent consumers of insurance. Thus, it harms the public welfare to set penalties so high that they deter companies from denying claims that ought to be denied, thereby increasing the cost of insurance for all and removing it from the reach of poorer citizens in our country. Society should not be made to suffer these ill effects due to the lower courts' disregard of the due process excessiveness inquiry required by *Haslip*.

In these circumstances, *Haslip* should not be left for any extended period as the Court's only word on the issue of constitutionally excessive punitive damages. Although *Haslip* represented a constructive step, lower courts—and in particular the Alabama Supreme Court—simply have not gotten its message. Furthermore, because the Court affirmed the punitive damages award in *Haslip*, a contrasting decision invalidating an award would be particularly helpful in providing benchmarks for lower courts to gauge the constitutionality of the continuing parade of large punitive exactions.

B. The $750,000 Punitive Damages Award In This Case Is Constitutionally Excessive

A punitive damages award exceeds constitutionally permissible limits if it "is greater than reasonably necessary to punish and deter." *Haslip*, 111 S. Ct. at 1046. In making that determination in *Haslip*, the Court looked to whether the punitive damages "have some understandable relationship to compensatory damages" (*id.* at 1045), whether they are "grossly out of proportion to the severity of the offense" (*ibid.*), whether they are "in excess of" (*id.* at 1046) the criminal and civil penalties enacted by the legislature for the type of conduct at issue, and whether they merely reflect the plaintiff's "windfall" in having the "good fortune" to sue a defendant "with a deep pocket" (*id.* at 1045). All of these criteria conjoin to establish the constitutional excessiveness of the $750,000 punitive damages award in this case.

To begin with, the punitive damages here are 750 times the compensatory damages of $1,000. Because in most cases compensatory damages represent a fair measure of the societal injury caused by the defendant's conduct and thus reflect the strength of society's interest in deterring such conduct in the future, a gross disparity between punitive and compensatory awards—such as the 750:1 ratio in this case—is a telltale indicator that the punitive damages are unconstitutional because they ex-

ceed an amount reasonably necessary to punish and deter the wrongful conduct. In *Haslip* itself, the ratio of punitive to compensatory damages was approximately 4:1 (111 S. Ct. at 1037 n.2), which the Court found to be "close to the line" of unconstitutionality (*id.* at 1046). There is no justification whatever for the grossly larger figure in this case.

We do not, of course, propose any invariable rule that punitive damages beyond a particular multiple of compensatory damages are *ipso facto* unconstitutional. But to say that there may be circumstances in which a ratio higher than 4:1 would be justified—or even that this is such a case because of the small amount of compensatory damages at issue—surely does not mean, as the Alabama Supreme Court would have it, that the relationship between punitive and compensatory damages is constitutionally irrelevant. Indeed, such a conclusion simply cannot be squared with this Court's recognition in *Haslip* that punitive damages must bear "some understandable relationship to compensatory damages" (111 S. Ct. at 1045).

Similarly, the punitive damages award in this case is "grossly out of proportion to the severity of the offense." *Haslip*, 111 S. Ct. at 1045. As discussed below, petitioner did not violate any standard of conduct known (or knowable) to it at the time it acted. Therefore, its denial of respondent's claim was not "wrongful" at all. Indeed, the University, as the group policy holder, agreed with Principal's denial of respondent's insurance claim. See page 5, *supra*. Furthermore, now that the Alabama Supreme Court has established petitioner's obligations under Alabama insurance law, there is no reason to believe that *any* punitive damages are necessary to ensure future compliance with state law.

In any event, even assuming that some award of punitive damages was appropriate, the "severity" of petitioner's conduct plainly did not justify the exorbitant award returned by the jury in this case. Nothing in the record

suggests that Principal acted in a particularly heinous way. In fact, quite the opposite is true: the Alabama Supreme Court was forced to admit that "there is no evidence of * * * a pattern or practice of refusing to pay any borderline claims involving small amounts (so small that it would be difficult for the insured to obtain an attorney to properly evaluate or handle the collection of those claims)." App., *infra*, 3a-4a.[5]

Likewise, Principal did not act in a deceitful or surreptitious manner. It told respondent why it denied her claim, and it reconsidered that denial when respondent requested. Nor did the evidence before the jury demonstrate that Principal caused respondent to suffer particularly great injury, and in fact the jury awarded compensatory damages of only $1,000. Accordingly, there is absolutely no support for the Alabama Supreme Court's conclusory and result-oriented statements that respondent's "actual harm" was "[g]rievous" and that Principal's conduct was "moderately reprehensible." *Id.* at 3a. The closest the Alabama Supreme Court came to attempting to explain the outcome here was its observation that "parents should not have to bury their children" (*id.* at 2a). While no one denies the grief that respondent experienced from the loss of her daughter, that tragedy was *not* caused by Principal and *cannot* be the basis for the punitive damages award against it.

The Alabama Supreme Court also sought to justify the large punitive damages award on the ground that re-

[5] It was particularly indefensible for the Alabama Supreme Court to uphold the finding of bad faith on the basis of the provision in Principal's internal manual that policy language should not be given "a narrow interpretation." App., *infra*, 36a. The fact that Principal elected to read its policies liberally rather than strictly does not mean that it was required, upon pain of punitive damages liability, to ignore the plain language of the definition of "dependent" and distort the meaning of what it reasonably believed was an unambiguous term. The ironic but foreseeable consequence of the Alabama Supreme Court's ruling will be the elimination of such liberal construction provisions in insurance policies.

spondent's actual damages were small and might not provide a sufficient incentive to bring suit. App., *infra*, 2a-3a. This theory, apparently endorsing an *inverse* relation between punitive and compensatory damages, is nothing short of perverse and robs the due process standard of all content: if actual damages are small, that by itself necessitates large punitive damages under the reasoning below; conversely, if actual damages are substantial, that equally would warrant sizable punitive damages as a multiple of the compensatory award. Such a "heads I win, tails you lose" approach is incompatible with any meaningful due process constraint on excessive punitive damages.

We do not mean to say that a state may not choose to encourage the bringing of small claims by allowing successful punitive damages plaintiffs to recover judgments sufficient to ensure access to legal help in bringing their claims. And such a policy could justify an award that produces a ratio considerably greater than 4:1. But this consideration cannot begin to justify the "sky's the limit" result approved in this and other cases by the Alabama Supreme Court.

In addition, the Alabama Supreme Court referred in passing to the unquestionable proposition that "[t]he amount of punitive damages should be in excess of the profit made by defendant through its wrongful conduct." App., *infra*, 4a. The court did not undertake, however, to justify the $750,000 punitive damages award in relation to any such profit. All the court could and did conclude was that "the award *much more* than removes the profit in this case" (*id.* at 4a (emphasis added))—a conclusion that equally would extend to punitive damages of $7.5 million or $75 million and in no way justifies the jury's $750,000 award.[6]

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[6] The punitive damages award also cannot be justified by reference to legislatively enacted penalties for comparable conduct. While a comparison to the Alabama criminal fine of $10,000 for insurance fraud did not tip the constitutional balance in *Haslip*, the conduct

The Alabama Supreme Court also sought to justify the $750,000 punitive damages award on the ground that Principal's " 'assets and profits are measured in billions of dollars' " and therefore the award " 'will have a minor impact on' " Principal and will " 'not impose economic hardship on [it].' " App., *infra*, 4a, quoting the district court's opinion (App., *infra*, 23a). This reasoning, which would support gigantic awards against large publicly-held companies in every case, wholly without regard to the nature of the misconduct or the magnitude of the injury it caused, is precisely what *Haslip* forbids: punitive damages "must be guided by more than the defendant's net worth. Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." 111 S. Ct. at 1045. Whatever role a corporate defendant's size or wealth properly may play in the punitive damages calculus, it clearly may not be the sole or primary basis sustaining an otherwise impermissible award.

Finally, as Justice Kennedy recognized in *Haslip*, "[a] verdict returned by a biased or prejudiced jury no doubt violates due process, and the extreme amount of an award compared to the actual damage inflicted can be some evidence of bias or prejudice in an appropriate case." 111 S. Ct. at 1055 (concurring opinion). This case well illustrates the problem of jury prejudice: the exorbitant puni-

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involved in the present case is far less reprehensible than the deliberate and outright fraud of Lemmie Ruffin and, unlike that wrongdoing, undoubtedly does not even constitute a crime. Furthermore, the Court's concern in *Haslip* about the possibility of incarceration in addition to a fine (111 S. Ct. at 1046) is allayed by considering civil penalty statutes; our review of this area indicates that the size of the civil penalty authorized by state statute for bad-faith denial of insurance benefits is strictly limited, ranging from an award of interest to a maximum penalty of 25% of the withheld benefit. See, *e.g.*, Mich. Comp. Laws Ann. § 500.2006 (1983) (interest); Tenn. Code Ann. § 56-7-105(a) (1989) (25%). Only one state legislature has authorized punitive damages in bad-faith cases without limiting the amount that may be awarded. See R.I. Gen. Laws § 9-1-33 (1985).

tive damages award strongly suggests that the jury's exercise of its discretion was moved by sympathy for the tragedy of a mother whose daughter died from a dreaded disease, and antipathy (or at least unconcern) for a large, impersonal, and out-of-state corporation that (as ultimately determined in this litigation) mistakenly denied the mother's claim for dependent's insurance benefits. What is more, the jury's natural predisposition toward respondent was greatly magnified by her tactics at trial—in particular, by the introduction into evidence of a highly inflammatory and prejudicial videotape showing respondent's dying daughter even though the tape was irrelevant to any contested issue at trial (since Principal conceded both the cause of death and Ms. Warren's deteriorated condition as a result of her illness).[7] It is precisely in such instances, where passion and prejudice threaten an unpopular or unsympathetic defendant's right to a fair trial, that the protections of the Constitution are most needed.

In sum, *Haslip* compels the conclusion that the $750,000 punitive damages award in this case is constitutionally excessive. No rational understanding of *Haslip* would sustain the exorbitant award here. Nor can the decision below be dismissed as a singular aberration or an individual misapplication of *Haslip* to this particular case. Rather, the facts here are all too typical, and the Alabama Supreme Court's decision all too representative, of a disturbing trend of cases that distort or ignore *Haslip*'s

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[7] The videotape presented an extremely graphic portrayal of Warren's illness approximately one month before her death. In addition to the heart-rending pictures of Warren's gravely ill state, the videotape also included such scenes as a nurse administering morphine to Warren by means of a subclavian catheter. See RT 281. The effect of the tape was exacerbated by respondent's request to be excused during its presentation and by the close of her case immediately after the tape had been shown to the jury. Respondent's only purported justification for playing the tape was to demonstrate Warren's deteriorated physical condition shortly before her death, an irrelevant fact that Principal did not dispute at trial. RT 281-282.

due process requirement. A clearer instance of the abuse of punitive damages, or of the lower courts' persistent failure to confront that abuse, would be difficult to imagine.

II. THE DUE PROCESS CLAUSE PROHIBITS THE RETROACTIVE IMPOSITION OF PUNITIVE DAMAGES FOR CONDUCT THAT WAS NOT WRONGFUL AT THE TIME IT WAS PERFORMED

This Court's review is also warranted on the second issue presented here: whether due process forbids the imposition of punitive damages for conduct that was not wrongful at the time it occurred and indeed was not declared to be even a breach of contract (let alone a bad-faith tort) until the very case in which the punitive damages award was made. A similar issue was raised in *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813 (1986), and the Court, although not reaching the question, recognized that it was an "important issue[] which, in an appropriate setting, must be resolved." *Id.* at 828-829. See also *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 87 (1988) (O'Connor, J., concurring in part and concurring in the judgment). This case provides the Court with an "appropriate" opportunity to resolve that issue.

It is a fundamental precept of our constitutional system that the government may not punish a person for conduct that was not proscribed at the time the person acted. As the Court has explained this requirement of fair notice:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. * * * [B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.

Grayned v. *City of Rockford*, 408 U.S. 104, 108 (1972); see also *Hoffman Estates* v. *Flipside, Hoffman Estates*, 455 U.S. 489, 498 (1982). Thus, the law must give, "at a minimum, * * * fair notice that certain conduct is proscribed" (*Rabe* v. *Washington*, 405 U.S. 313, 315 (1972)) in order to "enable[] individuals to conform their conduct to the requirements of law." *Roberts* v. *United States Jaycees*, 468 U.S. 609, 629 (1984). See also, *e.g.*, *United States* v. *Locke*, 471 U.S. 84, 108 (1985); *Marks* v. *United States*, 430 U.S. 188, 191-192 (1977); *Smith* v. *Goguen*, 415 U.S. 566, 572-574 (1974); *Bouie* v. *City of Columbia*, 378 U.S. 347, 350-355 (1964); *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939).[8]

The retroactive imposition of punishment for previously unproscribed conduct violates this cardinal principle of fair notice. The constitutional vice is that potential defendants are given *no* notice that their conduct will be regarded as wrongful because, at the time they acted, " 'no standard of conduct [was] specified at all.' " *Hoffman Estates*, 455 U.S. at 495 n.7, quoting *Smith* v. *Goguen*, 415 U.S. at 578, and *Coates* v. *City of Cincinnati*, 402 U.S. 611, 614 (1971). Because punitive damages are grounded in notions of deterrence and retribution, the Court's observation in *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 17-18 (1976), is directly relevant here: "the retrospective imposition of liability [cannot be based] on any theory of deterrence * * * or blameworthiness."

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[8] It is well settled that this constitutional protection applies to civil as well as criminal penalties. "The ground or principle of [this Court's] decisions was not such as to be applicable only to criminal prosecutions. It was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all." *Small Co.* v. *American Sugar Refining Co.*, 267 U.S. 233, 239 (1925). See also, *e.g.*, *Hoffman Estates*, 455 U.S. at 499; *Boutilier* v. *INS*, 387 U.S. 118, 123 (1967); *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402 (1966); *Jordan* v. *De George*, 341 U.S. 223, 231 (1951); *Champlin Refining Co.* v. *Corporation Comm'n*, 286 U.S. 210, 240-243 (1932); *Cline* v. *Frink Dairy Co.*, 274 U.S. 445, 463 (1927).

This principle is controlling here and precludes the award of punitive damages against Principal. At the time it denied respondent's claim, Principal had no way of knowing that the phrase "attending school on a full-time basis" would apply to someone who, like Ms. Warren, had for 18 months been neither enrolled in school nor actually attending classes, even where this was due to an ultimately fatal illness. As the Alabama Supreme Court acknowledged, the policy language was not ambiguous on its face; on the contrary, it was "clear and unambiguous and suggest[s] but a single meaning." App., *infra*, 35a.

Moreover, no Alabama court had construed that term, and nothing in Alabama law even hinted that relatively contemporaneous enrollment and actual attendance were not the correct standards for determining whether a person who was not otherwise a "dependent" under the policy, and hence would be excluded from coverage, nonetheless would remain eligible because "attending school on a full-time basis."[9] And the absence of fair notice in this case is tellingly demonstrated by the fact that the University, based on its own review, agreed with Principal's denial of the claim. In these circumstances it is clear that Principal is being punished for violating a rule of law that had not yet been articulated by the courts of Alabama when Principal denied respondent's claim.

Under Alabama law, as the Alabama Supreme Court recognized, the tort of bad-faith denial of insurance benefits is not established—and hence punitive damages may not be awarded—unless the insurer engaged in "inten-

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[9] In fact, where the issue has been litigated in other states, courts have consistently recognized that indistinguishable policy provisions do not give rise to a claim for dependent's benefits in comparable circumstances. See *Margie Bridals, Inc.* v. *Mutual Benefit Life Ins. Co.*, 379 N.E.2d 62 (Ill. App. 1978); *Colonial Life Ins. Co.* v. *Hazelton*, 711 S.W.2d 305 (Tex. App. 1986); *Blue Cross & Blue Shield of Florida* v. *Cassady*, 496 So. 2d 875 (Fla. App. 1986).

tional misconduct" because it had " 'no lawful basis for the refusal coupled with [its] actual knowledge of that fact' " (App., *infra*, 39a):

> "No lawful basis" * * * means that the insurer lacks a legitimate or arguable reason for failing to pay the claim. * * * When a claim is "fairly debatable," the insurer is entitled to debate it, whether the debate concerns a matter of fact or law. "Coupled with actual knowledge of that fact" implies conscious doing of wrong. Bad faith, then, is not simply bad judgment or negligence. It imports a dishonest purpose and means a breach of a known duty * * *.

Id. at 40a-41a. Here, as Justice Maddox stated in his dissent below, Principal's "obligation to pay was not established until [the Alabama Supreme Court] heard the case on appeal" (*id.* at 12a), and therefore it "is being fined for failing to win the legal debate over whether the policy language was ambiguous." *Id.* at 9a. The imposition of punitive damages based on retroactive "changes [in] the rules" (*id.* at 12a), for conduct that Principal did not know and could not have known was "wrongful," is an egregious violation of the fair-notice requirement of due process.

Most courts that have considered the question have recognized that punitive damages may not be awarded for conduct that was not wrongful at the time it occurred. See, *e.g.*, *Soderbeck* v. *Burnett County*, 752 F.2d 285, 290-291 (7th Cir. 1985); *Nees* v. *Hocks*, 536 P.2d 512, 517 (Or. 1975); *Kelsay* v. *Motorola, Inc.*, 384 N.E.2d 353, 361 (Ill. 1978). Other courts, however, like the court below, have allowed such retroactive imposition of punitive damages over federal due process objections. See, *e.g.*, *Peterson* v. *Superior Court*, 642 P.2d 1305 (Cal. 1982); *Grimshaw* v. *Ford Motor Co.*, 174 Cal. Rptr. 348 (Ct. App. 1981). The Court's review is warranted to

resolve this important and recurring punitive damages issue.[10]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 1991

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[10] In her opposition to our request for a stay in this Court, respondent asserted that we had not preserved this issue below. That is incorrect. Principal raised this claim before the trial court in its Motion for a New Trial after remand from the Alabama Supreme Court (at 3, see CR 3) and at oral argument on that motion (see CR 116-117), and in the Alabama Supreme Court in its brief below (at 25, 42-44).

APPENDICES

APPENDIX A

SUPREME COURT OF ALABAMA

SPECIAL TERM, 1991

1900294

PRINCIPAL FINANCIAL GROUP, ETC.

v.

BARBARA CAROLINE THOMAS

Appeal from Mobile Circuit Court
(CV-87-2561)

[Released Jul. 26, 1991]

PER CURIAM.

See *Thomas v. Principal Financial Group*, 566 So.2d 735 (Ala. 1990), in which we remanded and held that any consideration of the post-judgment motion filed by Principal Financial Group, d/b/a Principal Mutual Life Insurance Company ("Principal Mutual"), alleging that the $750,000 punitive damages award was excessive should be in accordance with *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), and *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989).

Judge Douglas Johnstone conducted a thorough hearing pursuant to *Hammond* on the issue of punitive damages; and, in determining whether $750,000 exceeded an amount necessary to punish Principal Mutual and to deter it and others similarly situated from committing similar acts in the future, he considered the seven factors listed in *Green*

Oil, 539 So.2d at 223-24, and compared the verdict with other jury verdicts in similar cases before concluding, in his thorough and scholarly opinion, that "the jury's verdict accomplishes the purposes and goals of punitive damages under Alabama law and is not excessive when viewed in light of the decisions of our Supreme Court in *Hammond* and *Green Oil*."

From a review of the trial court's findings and from our independent review of the evidence, applying the *Green Oil* standards, we conclude that the $750,000 punitive damages award in this case does not exceed an amount necessary to punish Principal Mutual for its action and to deter it and others similarly situated from committing similar acts in the future.

The amount of punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small; if grievous, the damages should be much greater.

Time and order is reversed; parents should not have to bury their children. But sometimes they have to. Against that day, that evil day, that a mother hopes will never come, she pays her mite to an insurance company. In the event that evil day comes, that mother's mite will provide the means with which to bury that child. That day does come, but the insurance company does not pay the amount of money that the mite was supposed to secure. Why? To determine why, 12 good jurors and true, men and women from the judicial circuit in which the event happened, were chosen as triers of the fact. After evaluating all of the evidence, these impartial jurors found that this amount was not paid because the insurance company's claims examiners intentionally and recklessly failed to subject the results of their investigation of the mother's claim to cognitive evaluation and review and

found that the insurance company had no lawful basis for denying the mother's claim.

Is the actual harm slight or grievous? Grievous.

But the amount of life insurance was only $1,000. Yes, and the evidence shows that the out of pocket expenses incurred by the mother's lawyers—not their fees, but their out-of-pocket expenses—were $9,330.33 at the time of the *Hammond* hearing. The insurance company retains the $1,000; the insurance company refuses to pay this. How many lawyers will take this mother's case, knowing that they will have to pay more in out-of-pocket expenses to recover this $1,000 than they will be paid if they recover the entire $1,000? How many mothers will forgo litigation because they will have nothing even if they are successful? How many mothers, with this dependent life insurace coverage, have buried their children and not received this coverage?

A lack of a means of litigating because the contract amount involved is too small to obtain lawyers who can afford to file suit to recover only the contract amount would potentially deprive an insured, who thinks her case is just, of her day in court. This may free insurance adjusters from fairly investigating and reviewing small claims and may result in a loss of faith in the judicial system. Is this likely harm slight or grievous? Grievous.

The amount of punitive damages should reflect the degree of reprehensibility of the defendant's conduct. The refusal to pay a claim that the finders of the fact determined was not paid because the insurance company's claims examiners intentionally and recklessly failed to properly investigate and evaluate that claim is at least moderately reprehensible. Although there is no evidence of it in this case, if there is evidence that an insurance company engages in a pattern or practice of refusing to pay any borderline claims involving small amounts (so small that it would be difficult for the insured to obtain

an attorney to properly evaluate or handle the collection of those claims), that would be very reprehensible conduct.

The amount of punitive damages should be in excess of the profit made by the defendant through its wrongful conduct. From every indication, the award much more than removes the profit in this case.

In determining the excessiveness *vel non* of punitive damages, the Court must consider the financial condition of the defendant. The following appears in Judge Johnstone's excellent order:

> "According to its answers to plaintiff's post-remand interrogatories, defendant has no liability insurance available to pay the judgment entered against it in this case. Defendant's answers to the interrogatories indicate that the entire liability will be paid by the defendant, Principal Financial Group D/B/A Principal Mutual Life Insurance Company. At the post-remand evidentiary hearing, it was revealed that Principal Mutual's assets and profits are measured in billions of dollars. The parties offered into evidence the annual reports for the Principal Financial Group for the years 1986, 1987, 1988, and 1989. After reviewing this extensive financial information, and hearing the arguments of counsel for both sides, the trial court finds that the jury's verdict will have a minor impact on the defendant. Payment of the jury's verdict will certainly not impose economic hardship on the defendant."

Clearly, all of the costs of litigation would be more than adequately covered by the punitive damages awarded in this case.

No criminal sanctions or other punitive damages have been imposed upon Principal Mutual for the conduct made the basis of this action. Therefore, factors (6) and (7)

listed in *Green Oil* do not mitigate the punitive damages award in this case.

We concur with Judge Johnstone in the holding that the $750,000 punitive damages award in this case is not excessive.

The other issues raised by Principal Mutual have been resolved by *Pacific Mutual Life Ins. Co. v. Haslip*, —— U.S. ——, 111 S.Ct. 1032 (1991), and *United American Insurance Co. v. Brumley*, 542 So.2d 1231 (Ala. 1989).

The judgment of the trial court is affirmed.

AFFIRMED.

Hornsby, C.J., and Adams, and Ingram, JJ., concur.

Almon and Kennedy, JJ., concur in the result.

Shores, Houston, and Steagall, JJ., concur specially.

Maddox, J., dissents.

HOUSTON, JUSTICE (concurring specially).

I concur fully in the per curiam opinion; however, I write specially because I do not believe that Ms. Thomas should be entitled to receive the full award of punitive damages in this case.

The jury awarded Ms. Thomas only $1,000 as compensatory damages. This is clear from a thorough review of the record in this case, including the trial court's oral charge to the jury. Is Ms. Thomas entitled to receive the entire $750,000 in punitive damages awarded to her by the jury?

Justice Shores, in her special concurrence in *Fuller v. Preferred Risk Life Insurance Co.*, 577 So.2d 878, 886 (Ala. 1991), wrote:

> "I believe that much of the criticism surrounding the issue of punitive damages is due to the perception on the part of the public that punitive damages

awards sometimes amount to an undeserved windfall to the prevailing plaintiff. I believe it is true that sometimes an award does constitute an undeserved windfall to the plaintiff, but this fact has no bearing on the question of whether the award exceeds an amount appropriate to punish the defendant for the wrong committed and to deter others from similar conduct in the future. . . . If the court concludes that the amount is not so excessive as to deprive the defendant of his property in contravention of § 13, Ala. Constitution 1901, it nevertheless *may* also determine that it would be in the best interest of justice to require the plaintiff to accept less than all of the amount and to require the defendant to devote a part of the amount to such purposes as the court may determine would best serve the goals for which punitive damages are allowed in the first place: vindication of the public and deterrence to the defendant and to others who might commit similar wrongs in the future. In such cases, the court has the discretion to order the defendant to devote a portion or all of the amount to efforts to eliminate the conditions that caused the plaintiff's injury.

"In my opinion, the court may also order the defendant to pay part of the award either to the state general fund or to some special fund that serves a public purpose or advances the cause of justice. . . .

". . . The courts . . . have inherent authority to allocate punitive damages, with jurisdiction over both plaintiff and defendant, by reducing the amount that the plaintiff is to receive to less than the full amount of the verdict, and directing the defendant to pay a part of a punitive damages award to the state general fund or any special fund devoted to the furtherance of justice on behalf of all the people. To do so in proper cases could serve the purpose for which punitive damages were authorized to a greater

degree than would allowing the plaintiff to receive the entire amount."

Under the circumstances of this case, I think that Ms. Thomas should receive $250,000 of the punitive damages award; and that the general fund of the state should receive $500,000, the balance of the punitive damages award. It is due to the efforts of Ms. Thomas's attorneys that the public interest has been served. Therefore, I would hold that ⅓ of the expenses incurred in the litigation and ⅓ of the attorney fees in accordance with the contract with Ms. Thomas should be paid to Ms. Thomas's attorneys out of the $250,000 of the punitive damages allocated to Ms. Thomas. The balance of the $250,000 and all compensatory damages, in my opinion, should be paid to Ms. Thomas. Furthermore, I would hold that ⅔ of the expenses incurred in the litigation and ⅔ of the attorney fees based upon the employment contract between Ms. Thomas and her attorneys (a copy of the contract would need to be filed with the trial court) should be deducted from the $500,000 and paid to Ms. Thomas's attorneys; and the balance should be forwarded to the treasurer of the State of Alabama to be deposited in the general fund of the state.

The compensatory damages and the out-of-pocket expenses in this case were $1,000. The punitive damages were $750,000. A 750 to 1 ratio.

With regard to the amount of punitive damages that may be awarded, I do not know where the line was drawn by the majority opinion in *Pacific Mutual Life Insurance Co. v. Haslip*, —— U.S. ——, 111 S.Ct. 1032 (1991), between "the constitutionally acceptable and the constitutionally unacceptable" in a given case. —— U.S. at ——; 111 S.Ct. at 1043. Before concluding, the majority in *Haslip* wrote:

"We are aware that the punitive damages award in this case is more than 4 times the amount of

> compensatory damages, is more than 200 times the out-of-pocket expenses of respondent Haslip. . . . While the monetary comparisons are wide and, indeed, may be close to the line, the award here did not lack objective criteria."

—— U.S. at ——; 111 S.Ct. at 1046.

I do not know whether this indicates that there must be some kind of proportionality between compensatory damages and punitive damages. I would trust that it does not, if the jury is charged as it was in *Haslip* and if the trial court conducts a hearing in accordance with *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), and evaluates the case by the seven factors listed in *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989), and if this Court conducts an appropriate review. In the majority opinion in *Haslip* (—— U.S. at ——, 111 S.Ct. at 1040-45), the terms "windfall recovery" and "windfall" are used; the use of those terms indicates a concern that the amount received by the plaintiff as a result of the punishment of the defendant may be too great. Justice Shores aptly expressed this concern in *Fuller*. Therefore, I would reduce the amount the plaintiff is to receive to some figure more closely corresponding to the 200 to 1 punitive damages to out-of-pocket expenses ratio that existed in *Haslip*, and direct that the remainder of the punitive damages after expenses and attorney fees be paid to the State of Alabama general fund to be used for the public good.

Shores and Steagall, JJ., concur.

MADDOX, JUSTICE (dissenting).

On original deliverance, I expressed in a dissenting opinion (566 So.2d at 750) why I thought the trial judge was correct in granting the insurer's motion for a judgment notwithstanding the verdict on the bad faith claim. As I pointed out then, and point out again, the

insurer is being fined for failing to win the legal debate over whether the policy language was ambiguous, a legal issue the record in this case shows was involved in this case from the beginning. The statement of the facts in the original opinion (*Thomas v. Principal Financial Group*, 566 So.2d 735 (Ala. 1990)) shows, without dispute, that the company and the person entitled to the benefits were debating the question of whether the deceased young lady was a "dependent" within the meaning of the policy.

The issue of whether the deceased young lady was "attending school on a full-time basis," the policy language defining a covered dependent, continued to be debated. The issue was tried to a jury, and the trial judge, finding that the policy language, at least under the facts of this case, was ambiguous, allowed the coverage issue to go to a jury. The coverage issue was debated by the parties at oral argument of the case, in the parties' briefs, and in the written opinion issued by this Court, and as I pointed out in a special concurrence on the question, it was a close question whether the company was entitled to a directed verdict on the contract claim.[1]

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[1] There is no question that the deceased was not "attending school on a full-time basis," at the time of her death, and that she had not done so for many months prior to her death. The majority discussed this question in its opinion initially:

> "The words 'attending school on a full-time basis' are not patently ambiguous; that is, on their face they are clear and intelligible and suggest but a single meaning. 'Attending' is the present participle of 'attend.' 'Attend' is defined in *The American Heritage Dictionary of the English Language* (1969) as 'to be present at: *attend class.*' 'Full-time,' used in the policy as an adjective, defined in *The Random House Dictionary of the English Language* (1971) as 'working or operating the customary number of hours in each day, week, or month.' Thus, the words 'attending school on a full-time basis,' at least on their face, envision presence in school for the normal or standard period of time required. If this were the end of our inquiry, we would be compelled to hold the trial court in error for denying

It would be neither helpful nor persuasive to restate what I have already said in my original dissent concerning the question of whether the bad faith claim should have gone to a jury. The trial judge, applying the law of bad faith extant at the time, thought that it should not have. He granted the company's motion for a judgment notwithstanding the verdict. I thought he was right. See my dissent, 566 So.2d at 750.

The law of bad faith refusal to pay first-party insurance claims has been troubling. I expressed some of the concerns that I had in a lengthy dissent in *Continental Assur. Co. v. Kountz*, 461 So.2d 802 (Ala. 1984), in which I noted that this Court should probably consider expanding the rule of law relating to the recovery of contractual damages in noncommercial insurance contract cases. In a footnote to that case, I suggested that the legislature might wish to address the problem.

Principal Mutual's motions for a directed verdict and judgment notwithstanding the verdict, because the undisputed evidence showed that Ms. Warren was not attending school at the Mobile Academy at the time of her death and had not been doing so for approximately 18 months prior thereto . . . .

"The record in this present case reveals that the policy in question was a life insurance policy that was payable upon the death of a 'dependent,' whether death was the result of an accident or of an illness . . . . [A] manual used by Principal Mutual's claims examiner stated: 'All policy provisions shall be interpreted in accordance with the common understanding of their language. The spirit or intent of the provision as distinguished from a narrow interpretation of the language shall be given effect;' [and the record reveals] that Edward Kahalley, Jr., an insurance consultant and administrator with over 20 years of experience in interpreting group insurance policies, and with knowledge of the practices and customs of the insurance industry, gave undisputed testimony as an expert that Ms. Warren would have been considered a 'dependent' within the meaning of the policy by all other insurers within the industry because she was rendered physically incapable of attending school by a debilitating illness that eventually caused her death. . . ."

566 So.2d at 739.

Mr. Justice Jones, in a special concurrence in the *Kountz* case said, "I think it appropriate, here, to caution the reader that neither [*Aetna Life Ins. Co. v. Lavoie*, 505 So.2d 1050 (Ala. 1987)] nor the instant case should be read as weakening the application of the directed verdict test in a bad faith claim context." 461 So.2d at 810. The opinion released today, it appears to me, does great violence to that test. In one portion of the opinion, the majority states: "After evaluating all of the evidence, these impartial jurors . . . found that the insurance company had no *lawful basis* for denying the mother's claim." This statement implies, if it does not hold, that an insurance company had better win any legal debate it has with its policyholder or suffer a penalty in such a size as the jury may impose. Whether this company had a "lawful basis" to deny the claim was not determined until this Court held in its first opinion in this case that a jury question was presented on the breach of contract claim. See *Thomas v. Principal Financial Group*, 566 So.2d 735, 739 (Ala. 1990), in which the majority stated that "[t]he words 'attending school on a full-time basis' are not *patently ambiguous*" (emphasis added).

The majority also refers to the "mother's mite," "lack of a means of litigating because the contract amount is too small to obtain lawyers," and "borderline claims." These statements, while arguably relevant to a determination of the reasonable expectancies of the parties in this insurance contract setting, seem to suggest that a jury's award of punitive damages can be sustained by a showing that these facts are present. When the tort of bad faith was first adopted, this Court seemed to stress the importance of the "directed verdict" test. It appears to me that the "directed verdict" test has been modified.

This Court is frequently asked to review disputes between a policyholder and an insurer over such terms as "resident of the same household" and other terms in a

policy. Although I agreed that the company was not entitled to a directed verdict on the contract claim in this case, I still believe that the trial judge was eminently correct in granting the insurer's motion for a judgment notwithstanding the verdict on the bad faith claim, because that was what the law of bad faith required, as I understood it at the time. That is why I suggest that this opinion changes the rules. For this Court to authorize the recovery of $750,000 against this company because it did not pay this claim, when this Court itself says that the words of the policy—"attending school on a full-time basis"—are not "patently ambiguous," and the obligation to pay was not established until this Court heard the case on appeal, shows that the "directed verdict" test has been substantially weakened, and I think that this Court's consideration of such factors as the "mother's mite" and the "lack of a means of litigating because the contract amount is too small to obtain lawyers," [2] is inappropriate in the context of the legal question whether the deceased child was "attending school on a full-time basis," a term this Court found was not "patently ambiguous." Whether the child was covered or not covered was a legal question, and the wealth of the policyholder and the size of the policy should have been irrelevant in answering that legal question, which was not answered until long after the jury had made its award. What if the policyholder was a billionaire and the policy was in the sum of $1 million? Would that change the nature of the *legal question* whether the deceased child was "attending school as a full-time student," or whether the issue was a debatable one? Clearly the answer is "no."

Although I concurred in resolving another bad faith case, *Aetna Life Ins. Co. v. Lavoie*, 505 So.2d 1050 (Ala.

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[2] This Court has provided a simplified procedure for persons to prosecute small claims such as this in the district court. See, Rule 21, A.R.J.A.

1987), in which this Court required the insurer to pay extra contractual damages, I cannot agree that this case is similar to *Aetna*. In that case, this Court had previously refused to uphold a summary judgment issued in favor of the company on the bad faith claim, and noted that "this court has not foreclosed the possibility of recovery in tort for the bad faith refusal of an insurer to pay legitimate benefits due under an insurance policy." *Lavoie v. Aetna Life & Cas. Co.*, 374 So.2d 310, 312 (Ala. 1979). Here, it seems clear to me that there was a debatable issue from the very start.

Based on the foregoing, I think that the opinion issued today, on return to remand, is wrong; consequently, I must dissent.

Having expressed the reasons why I disagree with the majority opinion, I also am compelled to state my disagreement with Mr. Justice Houston's special concurrence, in which he states that this Court has the power to direct that a portion of the punitive damages should "be forwarded to the treasurer of the State of Alabama to be deposited in the general fund of the state." While I do not necessarily disagree with the principle that the legislature might enact legislation to have a portion of punitive damages awards in civil cases paid to the state, I do not believe this Court, by judicial decree, can accomplish it.

APPENDIX B

IN THE CIRCUIT COURT
OF MOBILE COUNTY, ALABAMA

Case No. CV 87-002561

BARBARA CAROLINE THOMAS, PLAINTIFF

vs.

PRINCIPAL FINANCIAL GROUP a/k/a or d/b/a
PRINCIPAL MUTUAL LIFE INSURANCE COMPANY,
DEFENDANT

ORDER ON MOTION FOR NEW TRIAL AND/OR REMITTITUR

This bad faith action comes before the Court for consideration of defendant Principal Mutual's renewed motion for new trial and/or remittitur, following the Alabama Supreme Court's August 3, 1990 decision reversing this Court's judgment notwithstanding the verdict on the bad faith claim. The Alabama Supreme Court remanded this action to this Court for consideration of defendant's excessiveness claims in accordance with *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986) and *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989).

At the outset, plaintiff filed an objection to defendant's renewed motion for new trial and remittitur on the ground that, by operation of the ninety-day rule contained in Rule 59.1 of the Alabama Rules of Civil Procedure, this Court is without jurisdiction to entertain defendant's renewed motion. However, in light of the Alabama Supreme Court's holding in *Luker v. City of Brantley*, 520 So.2d 517, 522 (Ala. 1987), plaintiff's objection is OVERRULED.

Plaintiff has also moved the trial court to strike certain constitutional challenges raised by the defendant follow-

ing remand. Plaintiff alleges that the defendant has attempted to raise several constitutional challenges for the first time in its renewed motion for new trial and/or remittitur. In this order, this Court will not undertake to judge which constitutional challenges have or have not been preserved for review. Suffice it to say that the Court finds no constitutional infirmity in the verdict.

Returning to defendant's motion for new trial and remittitur, the Court conducted a hearing pursuant to *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), accepted evidence from both parties, and heard oral arguments from the attorneys. After careful consideration of the arguments of counsel and the evidence admitted, both at trial and at the post-remand evidentiary hearing, defendant's motion for new trial and remittitur is DENIED.

Discussion

The Alabama Supreme Court's recent decisions reflect that a jury's award of punitive damages may be found to be excessive as a matter of law only if certain identifiable flaws are present. First, a jury's verdict of punitive damages is flawed as a matter of law if the jury's decision-making process was tainted by bias, passion, prejudice, or other improper motive. *Black Belt Wood Co., Inc. v. Sessions*, 514 So.2d 1249, 1264 (Ala. 1986) ("[A] remittitur or new trial should not be ordered on the ground of excessiveness of the jury's verdict except in those cases where the court can *clearly* see that the verdict has been reached on account of bias, passion, prejudice, corruption or other improper motive or cause"). Second, if a verdict for punitive damages goes beyond the accomplishment of society's goals of punishment and deterrence, the verdict is "flawed, thereby losing its constitutional protection", at least to the extent that it exceeds the accomplishment of those goals. *Green Oil v. Hornsby*, 539 So.2d 218, 221 (Ala. 1989); *Industrial Chemical v. Chandler*, 547 So.2d 812, 837 (Ala. 1988) ("'[A]lthough

punitive damages need bear no particular relationship to actual damages, they, nonetheless, *must not exceed an amount that will accomplish society's goals of punishment and deterrence*' ").

Hence, this Court must make essentially two determinations in reviewing the amount of the jury's verdict in the instant case. First, the Court must determine whether the jury's verdict was the result of a properly functioning jury, i.e., one not tainted or influenced by bias, passion, prejudice, corruption, or other improper motive or cause. *Hammond* at 1378; *Wilson v. Dukona Corp. N.V.*, 547 So.2d 70, 73 (Ala. 1989). Second, the trial court must determine whether the verdict, if the product of a properly functioning jury, is nevertheless excessive as a matter of law because it exceeds an amount which will accomplish society's goals of punishment and deterrence. *Green Oil* at 222.

1. *Properly Functioning Jury*

In determining whether the verdict was the product of a properly functioning jury, the Court is to consider its observations of the parties and their attorneys, the nature and quality of the evidence, the testimony of the witnesses, and the jury and its reaction to the parties, their attorneys, and the evidence. In *Hammond*, the Alabama Supreme Court held:

> "The cases have consistently held that in deciding whether a jury verdict is excessive because it is the result of passion, bias, corruption, or other improper motive, a trial judge may not substitute his judgment for that of the jury. . . . We have also recognized that the trial judge is better positioned to decide whether the verdict is so flawed. He has the advantage of observing all of the parties to the trial —plaintiff and defendant and their respective attorneys, as well as the jury and its reaction to all of the others. There are many facets to a trial that

> can never be captured in a record, so that the appellate courts are at a special disadvantage when they are called upon to review a trial court's action in this sensitive area, although increasingly they are required to do so. Therefore, it is not only appropriate, but indeed our duty, to require the trial courts to reflect in the record the reasons for interfering with the jury's verdict, or refusing to do so, on grounds of excessiveness of the damages.
>
> * * * *
>
> "In adopting this new procedure, we emphasize that no substantial [sic] rule of law has changed. A trial court may not conditionally reduce a jury verdict merely because it believes the verdict overcompensates the plaintiff . . . nor may the trial court substitute its judgment for that of the jury. We also reaffirm those cases which hold that, in considering the adequacy or excessiveness of a verdict, there can be no ironclad rule, and each case must be determined by its own facts. . . .
>
> "We simply now require the trial courts to state for the record the factors considered in either granting or denying a motion for new trial based upon the alleged excessiveness or inadequacy of a jury verdict. We know of no other way by which this Court can discharge fairly its role of review."

Id. at 1378-79 (citations omitted).

The trial judge was in a position to observe closely the conduct of each juror and the functioning of the jury as a whole throughout the trial. The jury was composed of capable, conscientious, sober men and women who took their sworn duties as jurors very seriously. Throughout the trial, the jurors appeared attentive, interested, and concerned with fulfilling their duties. This Court has discovered nothing to indicate bias, passion, prejudice, corruption, or other improper motive or cause on the part of the jury.

Moreover, particularly in light of the Alabama Supreme Court's decision in this case, the Court is of the opinion that the jury's verdict is consistent with the law and the evidence. The trial court has reviewed the entire trial of this case, particularly the evidence as to the culpability of the defendant and the Court's charge to the jury concerning the award of punitive damages. This Court believes the jury clearly understood the law applicable to bad faith.

The trial court instructed the jury as to the function and purpose of punitive damages. The Court instructed the jury that punitive damages are imposed to punish the defendant for its wrongdoing, and to deter the defendant and others from committing similar wrongs in the future. The Court instructed the jury that if it found that punitive damages should be asserted, in deciding the amount, it should weigh the enormity of the wrong and arrive at an amount that the jurors unanimously and collectively found necessary to punish the defendant and to prevent similar wrongs in the future. The trial court believes that the jury followed the Court's instructions, and diligently applied the law to the facts of this case in arriving at its verdict.

This Court further notes that Principal Mutual received outstanding representation by very competent and zealous counsel, who exhibited the highest degree of professionalism throughout the trial. In light of the facts in this case, particularly the difficult credibility choices the jury had to make with respect to defendant's employee-witnesses, the jury's verdict may very well have been larger had it not been for the splendid representation afforded by defense counsel.

After a careful review by the Court of the entire trial of this case, including the testimony of all witnesses and their demeanor, all the documentary and demonstrative evidence introduced at trial, and the Court's charge to the jury on damages, this Court is convinced that the jury

was not influenced by bias, passion, prejudice, corruption, or other improper motive or cause.

2. *Excessiveness as a Matter of Law*

This Court also finds that the amount of the jury's verdict is not excessive as a matter of law. As noted above, in deciding defendant's claim of excessiveness, the Court must ultimately determine whether the damages exceed an amount necessary to accomplish society's goals of punishment and deterrence. In *Green Oil v. Hornsby*, 539 So.2d 218 (Ala. 1989), the Alabama Supreme Court held that the following non-exclusive factors should be considered in making this determination:

> "The following could be taken into consideration by the trial court in determining whether the jury award of punitive damages is excessive or inadequate:
>
> > "'(1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievious, the damages should be much greater.
> >
> > "'(2) The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or "cover up" of that hazard and the existence and frequency of similar past conduct should all be relevant in determining this degree of reprehensibility.
> >
> > "'(3) If the wrongful conduct was profitable to the defendant, the punitive damages should re-

> move the profit and should be in excess of the profit, so that the defendant recognizes a loss.
>
> "'(4) The financial position of the defendant would be relevant.
>
> "'(5) All of the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.
>
> "'(6) If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into account in mitigation of the punitive damages award.
>
> "'(7) If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award.'"

Green Oil v. Hornsby, 539 So.2d at 223-24 (Ala. 1989), *quoting*, *Aetna Life Insurance Co. v. Lavoie*, 505 So.2d 1050, 1062 (Ala. 1987) (Houston, J., concurring specially).

In addition to these seven factors, the Alabama Supreme Court has held that the extent to which the defendant is insured against a jury's verdict is a proper consideration. *Industrial Chemical & Fiberglass Corp. v. Chandler*, 547 So.2d 812, 832 (Ala. 1988). The Alabama Supreme Court has also held that a trial court should compare the verdict claimed to be excessive with other jury verdicts awarded in similar cases. *Burlington Northern R.R. Co. v. Whitt*, [Ms. 88-376, Sept. 21, 1900], —— So.2d —— (Ala. 1990); *Land & Associates, Inc. v. Simmons*, 562 So.2d 140, 150 (Ala. 1989).

Application of the Green Oil Factors

The trial court has applied the nine factors identified hereinabove to the instant case in a four-step approach. First, the Court has considered the likely *impact* that the

jury's verdict will have on the defendant (in light of defendant's financial condition and the availability *vel non* of liability insurance). Second, this court has compared the impact of the jury's verdict with the severity of defendant's misconduct (i.e., defendant's knowledge of the likelihood of harm, both actual and potential, and the degree of reprehensibility of defendant's misconduct). Third, this Court has considered the mitigating factors which have been identified by the Alabama Supreme Court (i.e., costs of litigation, criminal sanctions, and other civil actions arising out the same misconduct). Fourth, and finally, this Court has conducted a comparative analysis of the jury's verdict in this case with other jury verdicts (affirmed by the Alabama Supreme Court) in similar cases.

Impact

The Alabama Supreme Court's recent decisions concerning excessiveness of punitive damages focus upon the *impact* that a jury's verdict of punitive damages will have on the defendant. In *Wilson v. Dukona Corp., N.V.*, 547 So.2d 70 (Ala. 1989), the Supreme Court reviewed the defendants' assets in detail and considered the defendants' ability to pay the punitive damages awarded by the jury. The Court found that because the punitive aspect of the verdict would have a devastating financial *impact* upon the defendants, the verdict punished the defendants too severely for the misconduct from which they had been held liable, and was, therefore, excessive as a matter of law. *Id.* at 74. In so holding, the Court compared the gravity of the defendants' wrongful conduct with the impact that the verdict was likely to have on the defendants. The Court found that the *impact* of the jury's overall award of compensatory and punitive damages was disproportionate to the wrong committed by the defendants. Consequently, the Alabama Supreme Court remitted the punitive damages aspect of the jury's verdict in its entirety. *Id.*

In *Industrial Chemical v. Chandler*, 547 So.2d 812 (Ala. 1988), the Supreme Court also considered the impact on the defendant in deciding whether a punitive damages verdict was excessive as a matter of law. Following a remand for a *Hammond* hearing, the Court refused to remit the $5 million of punitive damages awarded against the defendant. In refusing to remit, the Court noted that the only reliable method of determining excessiveness, assuming a properly functioning jury, is to consider the defendant's financial worth, gauge the *impact* of the jury's verdict upon the defendant, and compare that to the severity of the defendant's conduct:

> "Justice Jones isolated the problem [in *Ridout's-Brown Service, Inc. v. Holloway*, 397 So.2d 125 (Ala. 1981)] caused by the difficulty of injecting the question of the adequacy of the damages into the proceedings without impermissibly impugning the fact-finding process regarding liability (evidence of the defendant's financial worth being inadmissible). His suggestion was to permit the adequacy of the damages to be examined in a post-judgment proceeding by way of judicial review, with the hope of arriving at an amount proportional to its intended purpose, *to fit the punishment to the offensive conduct and the offender.*
>
> "This is the logical conclusion of *Hammond.* Any number of factors are appropriate for the trial court's consideration when deciding whether to interfere with a jury verdict on grounds of excessiveness of the damages, *and the impact on the parties is best fixed by post-judgment review of financial worth.* Protection is then afforded both the plaintiff, whose right to a reliable factfinding process is not sacrificed, and the defendant, whose right to a fair punishment is not diminished."

Id. at 832 (emphasis added). Thus, in order for the trial court to conduct a meaningful review of a jury's

verdict for excessiveness in the instant case, this Court must gauge the impact of the punitive damages on the defendant and compare that to the misconduct of the defendant. Impact cannot be gauged without consideration of defendant's financial worth and the availability of liability insurance.

According to its answers to plaintiff's post-remand interrogatories, defendant has no liability insurance available to pay the judgment entered against it in this case. Defendant's answers to the interrogatories indicate that the entire liability will be paid by the defendant, Principal Financial Group D/B/A Principal Mutual Life Insurance Company. At the post-remand evidentiary hearing, it was revealed that Principal Mutual's assets and profits are measured in billions of dollars. The parties offered into evidence the annual reports for the Principal Financial Group for the years 1986, 1987, 1988, and 1989. After reviewing this extensive financial information, and hearing the arguments of counsel for both sides, the trial court finds that the jury's verdict will have a minor impact on the defendant. Payment of the jury's verdict will certainly not impose economic hardship on the defendant.

Severity of Defendant's Conduct

Regarding the first and second factors set out in *Green Oil*, (i.e., (1) that punitive damages should bear a reasonable relationship to the harm likely to occur as well as to the harm that actually has occurred from the defendant's conduct and (2) the degree of reprehensibility and duration of defendant's conduct), the Court has considered the arguments of counsel for both parties in light of the evidence, and is of the opinion that remittitur is not warranted on these grounds.

The jury could have reasonably found from the evidence, particularly the testimony of JoAnn Robbins and Mike Wallace, that defendant knew that Melinda Warren

met the definition of a "dependent" at the time of her death because she was "attending school on a full-time basis" at the time she became so physically disabled by her illness that she could no longer attend classes. The expert testimony of Edward Kahalley established that, according to the custom and practice within the insurance industry, Melinda Warren was considered a "dependent" within the meaning of the policy because she was rendered physically incapable of attending school by a debilitating illness which eventually caused her death. Kahalley also testified that Mrs. Thomas' claim would have been paid by all other insurers in the industry.

The undisputed evidence established (by virtue of the policies and procedures contained in defendant's claims manual) that defendant's claims examiners were prohibited from making a narrow interpretation of the policy language, and were required to construe the policy language broadly so as to afford coverage. The jury could have found from the evidence that all of defendant's claims examiners disregarded these internal policies and purposefully placed a narrow and restrictive interpretation on the policy language, contrary to the interpretation generally placed on such language within the industry.

Lastly, the jury could have reasonably found from the evidence that defendant denied Mrs. Thomas' claim by disregarding information (in its own claim file) which established that the claim should have been paid. At a minimum, the jury could have found that defendant's agents were confused as to whether Melinda was covered as a "dependent", and that, despite knowledge that they had insufficient information upon which to deny the claim, consciously and intentionally refused to investigate the facts surrounding Melinda's death. The testimony of both Robbins and Wallace can be construed as admitting that the claim would have been paid if they had known all of the facts surrounding Melinda's protracted illness.

Thus, returning to the *Green Oil* factors under consideration, the record contains evidence from which the jury could properly have found that the defendant's conduct was reprehensible. Implicit in the verdict was a finding that the defendant either intentionally denied Mrs. Thomas' claim knowing that it did not have a legitimate or arguable basis for such denial, or that defendant intentionally failed to investigate Mrs. Thomas' claim knowing that it did not have sufficient information in its file upon which to legitimately deny the claim.

Moreover, the harm which was likely to, and which actually did, occur from defendant's conduct was grievous. Although the evidence at trial established that the actual monetary loss suffered by Mrs. Thomas was $1000.00, the harm caused by defendant's misconduct cannot be measured simply by reference to the amount of insurance involved. The very purpose of the insurance was to provide a parent, aggrieved by the untimely loss of a child, with a relatively small death benefit to assist with expenses during a time of crisis. The evidence (which was excluded from the jury) established that Mrs. Thomas needed the $1000.00 proceeds to help pay for Melinda's funeral expenses. Defendant knew that Mrs. Thomas needed the proceeds for this purpose. The Alabama Supreme Court's decisions reflect that the policy underlying the tort of bad faith is "that an insured purchases insurance and not an unjustified court battle when he enters into the insurance contract." *Gulf Atlantic Life Ins. Co. v. Barnes*, 405 So.2d 916, 925 (Ala. 1981). "The law will not allow an insurer to willfully refuse to evaluate or honor a claim with the knowledge that the avowed purpose of the insurance contract was to protect the insured at his weakest and most perilous time of need." *Vincent v. Blue Cross-Blue Shield of Alabama*, 373 So.2d 1054, 1067 (Ala. 1979). The very purpose of the jury's verdict was to punish the defendant for forcing Mrs. Thomas into an unnecessary, prolonged court battle over a $1,000.00 claim

which should have been paid, according to the evidence, without dispute or delay.

Mitigating Factors

Defendant presented no evidence with respect to other civil litigation or criminal sanctions which should be taken into consideration in the mitigation of the jury's assessment of damages. In the absence of such evidence, the Court is in no position to evaluate or consider these factors. *McDowell v. Key*, 557 So.2d 1243, 1249 (Ala. 1990).

Comparative Analysis of Similar Cases

Finally, in ruling upon defendant's motion for remittitur, the Court has compared the jury's verdict with other jury verdicts affirmed by the Alabama Supreme Court in similar cases. In conducting this comparative analysis, the trial court has considered the judgments affirmed in the following bad faith and insurance fraud cases:

Bad Faith Cases

1. *United Services v. Wade*, 544 So.2d 906 (Ala. 1989) ($3.75 million reduced to $2.75 million)
2. *United American Ins. Co. v. Brumley*, 542 So.2d 1231 (Ala. 1989) ($1 million)
3. *Nationwide Ins. Co. v. Clay*, 525 So.2d 1339 (Ala. 1987) ($1.25 million)
4. *Aetna Life Ins. Co. v. Lavoie*, 505 So.2d 1050 (Ala. 1987) ($3.5 million reduced to $500,000)

Insurance Fraud Cases

1. *Intercontinental Life Ins. Co. v. Lindblom*, [Ms. 89-14, Sep. 28, 1990], —— So.2d —— (Ala. 1990) ($3 million reduced to $1 million)
2. *Land & Associates v. Simmons*, 562 So.2d 140 (Ala. 1989) ($2.5 million remitted to $600,000)

3. *HealthAmerica v. Menton*, 551 So.2d 235 (Ala. 1989) ($1.8 million)

4. *Pacific Mutual Life Ins. Co. v. Haslip*, 553 So.2d 537 (Ala. 1989) ($1 million—fraud)

5. *North Carolina Mutual Life Ins. Co. v. Holley*, 533 So.2d 497 (Ala. 1987) ($1 million remitted to $500,000)

In light of these cases, it does not appear that the jury's verdict in the instant case is out of line with jury verdicts returned and affirmed in similar cases.

Conclusion

After considering all of the applicable *Green Oil* factors, including the enormity of the wrongfulness of defendant's conduct and its financial condition, the trial court cannot say with conviction that $750,000.00 punishes the defendant too severely for its misconduct. It is the opinion of this Court that the jury's verdict accomplishes the purposes and goals of punitive damages under Alabama law and is not excessive when viewed in light of the decisions of our Supreme Court in *Hammond* and *Green Oil*. Accordingly, the defendant's motion for new trial and remittitur is hereby DENIED.

DONE this 2nd day of November, 1990.

/s/ Douglas Johnstone
DOUGLAS JOHNSTONE
Judge
Circuit Court of Mobile County

APPENDIX C

SUPREME COURT OF ALABAMA

SPECIAL TERM, 1990

88-834

BARBARA CAROLINE THOMAS

v.

PRINCIPAL FINANCIAL GROUP, a/k/a or d/b/a PRINCIPAL MUTUAL LIFE INSURANCE COMPANY, a corporation

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88-925

PRINCIPAL MUTUAL LIFE INSURANCE COMPANY

v.

BARBARA CAROLINE THOMAS

Appeals from Mobile Circuit Court
(CV-87-2561)

[Released Aug. 3, 1990]

HOUSTON, JUSTICE.

Barbara Caroline Thomas sued Principal Financial Group, d/b/a Principal Mutual Life Insurance Company ("Principal Mutual"), seeking damages for breach of contract and bad faith refusal to pay insurance benefits.

At trial, Ms. Thomas's motion for a directed verdict on the contract claim and Principal Mutual's motion for a directed verdict on both claims were denied and the case was submitted to a jury, which awarded Ms. Thomas $1,000 on her breach of contract claim and $750,000 on her bad faith claim. The trial court entered a judgment on that verdict. Principal Mutual moved for a judgment notwithstanding the verdict on both claims or, in the alternative, a new trial. The trial court entered for Principal Mutual a judgment notwithstanding the verdict on the bad faith claim, but left intact the judgment for Ms. Thomas on the contract claim. Ms. Thomas appealed from the judgment for Principal Mutual on the bad faith claim, and Principal Mutual cross-appealed from the judgment for Ms. Thomas on the contract claim. We affirm the judgment for Ms. Thomas on the contract claim; we reverse the judgment for Principal Mutual on the bad faith claim and remand the case with directions.

The University of South Alabama Medical Center ("the University") contracted with Principal Mutual for group life insurance for its employees and their dependent children. The policy reads, in pertinent part, as follows:

> "The word 'Dependent' means only a Person's spouse and each unmarried child eight days but less than nineteen years of age, provided such individual is not eligible under this Policy for Personal Insurance as hereinafter defined and is not in the Armed Forces of any country. In addition to any natural born child of the Person, the word 'child' includes any legally adopted child; or stepchild or foster child who resides in the Person's household and is dependent upon such Person for his principal support and maintenance. *The word 'Dependent' shall also mean each unmarried child who is nineteen years but less than twenty-five years of age provided he is attending school on a full-time basis and is dependent upon the Person for his principal support and mainte-*

> *nance.* School vacation periods during any calendar year which interrupt but do not terminate what otherwise would have been a continuous course of study in that calendar year shall be considered a part of school attendance on a full-time basis." (Emphasis added.)

Ms. Thomas, an employee of the University, had a daughter, Melinda Warren, who in July 1984 had enrolled in a 1200-hour-work-study course in cosmetology at the Mobile Academy of Hair Design ("Mobile Academy"), when she was 21 years old. The course was not taught on a quarter or semester basis, but, instead, on a continuous basis until a degree was earned. After paying full tuition and after attending classes for a period of time, Ms. Warren became disabled and could not attend school after August 1985 due to ovarian cancer; she died of ovarian cancer in March 1987, at the age of 24. At the time of her death, Ms. Warren was unmarried and was dependent upon her mother for her principal support and maintenance. With the help of Janice Rehm, a representative of the University's personnel department, Ms. Thomas filed a claim with Principal Mutual for the $1,000 life insurance benefit that was payable for the death of a "dependent." JoAnn Robbins, a claims examiner with Principal Mutual, contacted Ms. Rehm and inquired as to whether Ms. Warren was "attending school on a full-time basis" at the time of her death. Ms. Rehm contacted Ms. Thomas and Betty Jo Tanner, the owner of the Mobile Academy. Ms. Rehm relayed the information that she received from Ms. Thomas and Ms. Tanner to Ms. Robbins, who made the following notation in the claim file:

> "4/24/87 Last on roll at school thru [sic] 9/85. Last year & 10 mos. in & out of hosp(imp) 30 times. Also went on chemo-(op trmts). Last 6 mos before death—She was completely bedridden.

"Attended
Mobile Academy of Hair Design
4467 Old Shell Road
Mobile, AL 36608

"Cosmetology College
Jo Tanner—Director
(205) 344-0685
"Only reason she wasn't in school beyond 9/85 was because she was sick."

In accordance with company procedure, Ms. Robbins prepared an evaluation sheet on Ms. Thomas' claim and sent it to her supervisor, Pam Davis, recommending that the claim be denied:

> "Melinda Warren was attending school on a full-time basis through 9/85 and was enrolled in the Mobile Academy of hair design. The contract provides that an unmarried child between the ages of 19 and 25 who is attending school on a full-time basis is a dependent. For the last year and 10 mos Melinda was disabled due to cancer. The contract also provides that dependent coverage will cease when an individual ceases to be a dependent as defined in Section 17. Feel we should decline benefits."

Ms. Davis approved that recommendation and made the following notation on the evaluation sheet:

> "Agree—was not an eligible dependent @ time of death."

The evaluation sheet was then forwarded by Ms. Davis to her supervisor, Mike Wallace, for a final determination as to whether the claim would be paid. Wallace decided to deny the claim and he wrote "agree" on the evaluation sheet. Thereafter, Ms. Robbins wrote a letter to Ted Ferguson, the personnel director at the University, stating in part:

> "According to the information we have received from your office, Melinda Warren was last on the role

> [sic] at school through September, 1985. She then became disabled and died on March 10, 1987. From September, 1985, through her demise she was not attending school on a full-time basis. Therefore, effective September, 1985, she would not meet the definition of a dependent as defined in the group policy and would not be eligible for dependent life insurance. Since she was not considered a dependent at the time of her demise, dependent life insurance benefits are not payable on this claim."

Ms. Thomas and her attorney wrote letters to Ms. Robbins, requesting that Principal Mutual reconsider its denial of her claim. Upon receipt of these letters, Ms. Robbins conducted a second review of the claim and prepared a second evaluation sheet, upon which she noted:

> "The insured is asking for reconsideration of our denial of this claim. Please review attorney's letter dated 6/23/87. I have reviewed the contract and feel our decision was correct. Feel we should write [insured] w/cc [carbon copy] to GPH [group policy holder] & atty, and reconfirm our denial. Do you have further recommendations?"

This evaluation sheet was then sent to Ms. Davis, who wrote "agree" on it. The claim was then reviewed jointly by Nancy Ford, another claims examiner, and Merle Kaplan, the senior claims consultant. Kaplan made the following notation on the evaluation sheet:

> "Reviewed with Nancy Ford. No contractual basis for continuance of coverage to the date of death. Respond to attornies [sic] letter citing contractual basis for denial."

Thereafter, Ms. Davis wrote a letter to Ms. Thomas's attorney stating that Principal Mutual's initial decision to deny the claim would stand. Upon receipt of this letter, Ms. Thomas filed suit.

Breach of Contract

Principal Mutual contends that the trial court erred in denying its motions for a directed verdict and judgment notwithstanding the verdict on the contract claim because, it argues, there was no fact question for resolution by the jury. Principal Mutual maintains that the policy clearly provided that the $1,000 benefit was payable to Ms. Thomas only if her daughter was a "dependent" at the time of her death; that to be a "dependent," Ms. Warren had to be "attending school on a full-time basis"; that the undisputed evidence showed that she had not been enrolled in, nor attending, school for approximately 18 months immediately preceding her death; and, therefore, that Ms. Thomas could not recover under the policy.

Ms. Thomas argues, on the other hand, that the words "attending school on a full-time basis" are ambiguous; that the undisputed evidence showed that Ms. Warren was enrolled in the Mobile Academy at the time of her death and was "attending school on a full-time basis" within the meaning of the policy, even though she had not attended classes for approximately 18 months immediately preceding her death; and, therefore, that the trial court did not err in denying Principal Mutual's motions for a directed verdict and judgment notwithstanding the verdict. The thrust of Ms. Thomas' argument is that she, not Principal Mutual, was actually entitled to a directed verdict on the contract claim. This argument is based upon her claim that Ms. Warren did not lose her status as a "dependent" under the policy because of the fact that the illness that eventually led to her death rendered her physically incapable of attending school prior to her death. Ms. Thomas argues strenuously that the evidence showed that under the circumstances of this case Principal Mutual contemplated that payment would be made. For the following reasons, we hold that a fact question was presented as to whether Ms. Warren was a "dependent" within the meaning of the policy at the time of her death.

This action was not pending on June 11, 1987; therefore, the applicable standard of review is the "substantial evidence rule." Ala. Code 1975, § 12-21-12. Thus, Principal Mutual would have been entitled to a judgment as a matter of law if, viewing the evidence in a light most favorable to Ms. Thomas, Ms. Thomas failed to present substantial evidence that Ms. Warren was a "dependent" within the meaning of the policy at the time of her death. *Watters v. Lawrence County*, 551 So.2d 1011 (Ala. 1989). "Substantial evidence" has been defined by the Legislature as "evidence of such quality and weight that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions as to the existence of the fact sought to be proven." § 12-21-12. In *West v. Founders Life Assurance Co. of Florida*, 547 So.2d 870, 871 (Ala. 1989), this Court, construing §12-21-12, stated that "substantial evidence" is "evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved."

The trial court correctly concluded as a matter of law that, under certain clear language of the policy, Ms. Warren's status as a "dependent" was to be determined as of the date of her death. *Alpine Constr. Co. v. Water Works Bd. of the City of Birmingham*, 377 So.2d 954, 956 (Ala. 1979) ("[t]here is scarcely a rule more firmly established than that the court, not the jury, will interpret the meaning of a contract, whether oral or written, unless the court determines the contract to be ambiguous and one of the parties makes an offer of proof as to surrounding facts and circumstances which would clarify the contract's meaning, in which case it is within the province of the jury to ascertain those facts and draw such inferences from them as are necessary to the interpretation of the contract, upon proper instructions by the court"). The trial court concluded, however, that the words "attending school on a full-time basis" were ambiguous

under the circumstances, and it instructed the jury to determine whether Ms. Warren was a "dependent" within the meaning of the policy at the time of her death.

The words "attending school on a full-time basis" are not patently ambiguous; that is, on their face they are clear and intelligible and suggest but a single meaning. "Attending" is the present participle of "attend." "Attend" is defined in *The American Heritage Dictionary of the English Language* (1969) as "to be present at: *attend class.*" "Full-time," used in the policy as an adjective, is defined in *The Random House Dictionary of the English Language* (1971) as "working or operating the customary number of hours in each day, week, or month." Thus, the words "attending school on a full-time basis," at least on their face, envision presence in school for the normal or standard period of time required. If this were the end of our inquiry, we would be compelled to hold the trial court in error for denying Principal Mutual's motions for a directed verdict and judgment notwithstanding the verdict, because the undisputed evidence showed that Ms. Warren was not attending school at the Mobile Academy at the time of her death and had not been doing so for approximately 18 months prior thereto. However, if all of the evidence is considered and viewed in a light most favorable to Ms. Thomas, as it must be in this case, it is apparent that the policy language does suffer from a latent ambiguity. An ambiguity is latent when the language employed is clear and intelligible and suggests but a single meaning but some extrinsic fact or extraneous evidence creates a necessity for interpretation or a choice among two or more possible meanings. *Black's Law Dictionary* (5th ed. 1979) (defining "ambiguity"); *Medical Clinic Bd. of the City of Birmingham-Crestwood v. Smelley*, 408 So.2d 1203 (Ala. 1981).

The record in the present case reveals that the policy in question was a life insurance policy that was payable upon the death of a "dependent," whether death was the

result of an accident or of an illness; that each claim submitted to Principal Mutual was reviewed on a case-by-case basis; that policy language was not always interpreted literally; that a manual used by Principal Mutual's claims examiners stated: "All policy provisions shall be interpreted in accordance with the common understanding of their language. The spirit or intent of the provision as distinguished from a narrow interpretation of the language shall be given effect"; that Edward Kahalley, Jr., an insurance consultant and administrator with over 20 years of experience in interpreting group insurance policies, and with knowledge of the practices and customs of the insurance industry, gave undisputed testimony as an expert that Ms. Warren would have been considered a "dependent" within the meaning of the policy by all other insurers within the industry because she was rendered physically incapable of attending school by a debilitating illness that eventually caused her death; [1] that

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[1] Mr. Kahalley testified, in pertinent part, as follows:

"Q. Let me give you a hypothetical to be extra clear: Assume that this young lady is between the ages of 19 and 25. Assume that she is living at home with her mother. Assume that she is dependent upon her mother for her principal support and maintenance. Assume that on March 19th, 1985, she re-enrolled in the Mobile Academy of Hair Design. In May of 1985—Oh, at that time she paid her full entry fee for a full 1200 hours. She paid the full $600.00 registration fee and tuition fee for 1200 hours. This was not a school on a quarter or semester basis . . . . She had her surgery in 1985, May 1985. That Dr. Clarkson has testified that as of June 1985 when she started getting chemotherapy that he would not expect her to be able to attend class any more. Assume that her last day—even though Dr. Clarkson said in June she was disabled—her last day in class was in August of 1985. That is September 1985 she could no longer be physically present in class. And Ms. Tanner—although she will testify that Melinda was fully paid up, she could come back whenever she could—had to send her permit back and took her off of her rolls because there was no reason [inaudible] every day and . . . she died March 1987.

there was a conflict in the evidence as to whether Ms. Warren was enrolled in the Mobile Academy at the time of her death; and that at least two of Principal Mutual's claims examiners, Ms. Robbins and Mr. Wallace, seemed confused as to exactly what the policy language meant.

Under the terms of this policy would she be covered for dependent life insurance?

"A. Yes.

"Q. Are you familiar with the practices and customs of the insurance industry?

"A. Yes.

"Q. Is that an opinion that reasonable people in the insurance industry could differ with?

". . . .

"A. Those people who have had any experience with adjudication of claims, that is with actually dealing with the policy language, I don't think they could differ on that opinion, no.

"Q. Let me show you something else that came out of the defendant's own claim file and ask you to read that into the record?

"A. Where it says message. I am not sure I can read that.

"Q. Read just this bottom line for one thing.

"A. 'The only reason she wasn't in school beyond 9/85 was because she was sick.'

"Q. Would that further support your opinion that this life insurance policy should have been paid?

"A. Sure.

"Q. And this is a document signed by JoAnn Robbins saying that she knew; is that correct?

"A. I assume so, yes.

"Q. What does it say on 4/24/87? Can you read that into the record?

"A. 'Last on roll at school through September '85, last year and ten months in and out of hospital, approximately 30 times. Also went on chemo, out patient' something—

"Q. Treatment.

"A. Is that 'treatment'? 'Last six months before death she was completely bedridden.'

"Q. Would that further support your opinion?

"A. Oh, most definitely."

Although Ms. Davis and Mr. Kaplan appear to have steadfastly maintained that the policy language did not contemplate that a person in Ms. Warren's position would be considered a "dependent" within the meaning of the policy, as previously shown, there was substantial evidence that it did contemplate that. We hold, therefore, that the trial court did not err in allowing the jury to determine whether Ms. Warren was "attending school on a full-time basis" and, thus, whether she was a "dependent" at the time of her death. *Alpine Constr. Co. v. Water Works Bd. of the City of Birmingham, supra.*

Bad Faith

Ms. Thomas contends that the trial court erred in entering a judgment for Principal Mutual notwithstanding the verdict on her bad faith claim. She argues that a fact question was presented as to whether Principal Mutual was guilty of bad faith in denying her claim. Principal Mutual, on the other hand, argues that there was no fact question to be resolved by the jury and, therefore, that the trial court did not err in entering a judgment for it as a matter of law.

This Court first recognized an actionable tort for an insurer's intentional refusal to pay a claim in *Chavers v. National Security Fire & Cas. Co.*, 405 So.2d 1 (Ala. 1981). The *Chavers* Court held that there was an implied-in-law duty of good faith and fair dealing in contractual relationships between insurers and their insureds. Bad faith was defined as "the intentional failure by the insurer to perform this duty implied in law." 405 So.2d at 5. The Court went on to hold:

> "[A]n actionable tort arises for an insurer's intentional refusal to settle a direct claim where there is either '(1) no lawful basis for the refusal coupled with actual knowledge of that fact or (2) intentional failure to determine whether or not there was any lawful basis for such refusal.' "

405 So.2d at 7. Accordingly, a two-tiered test was established by which to determine whether an insurer had acted in bad faith in refusing to pay a claim. In recognizing the new tort, the Court in *Chavers* explained that the policy considerations underlying the disallowance of a negligence standard of conduct in actions by insureds against their insurers did not proscribe a cause of action arising out of intentional misconduct by insurers:

> "We hold that the same policy considerations underlying the disallowance of a negligence standard of conduct in this context do not categorically proscribe a cause of action arising out of intentional misconduct by the insurer. To hold otherwise would render meaningless the long standing legal principle in this state which holds that every contract carries with it an implied in law duty of good faith and fair dealing. *See World's Exposition Shows, Inc. v. B.P.O. Elks, No. 148*, 237 Ala. 329, 186 So. 721 (1939). While freedom of contract must necessarily be preserved, the corresponding duty of good faith and fair dealing must similarly be preserved as an integral part of contractual relations. As Justice Jones reasoned in his special concurrence in [*Vincent v. Blue Cross-Blue Shield of Alabama*, 373 So.2d 1054 (Ala. 1979)], this good faith duty imposed not by the contract itself, but rather by law, should not be premised upon a negligence standard of conduct.
>
> > " 'The reasonable expectations of parties to an insurance contract contemplates a broad range of freedom on the part of the insurer to evaluate claims submitted thereunder and to decline payment in nonmeritorious cases. The corresponding duty to use diligence in the review and prompt payment of meritorious claims is contractually bargained for and *the law need not impose a further duty to enforce its negligent breach.* Similarly, this freedom (and, perhaps,

> the duty) not to honor, and thus legally dispute, claims of questionable validity in accordance with the terms of the contract is effectively denied if the law imposes so high a duty of faithful performance as to pose a threat of increased risks in the event the dispute is ultimately resolved adversely to the insurer.
>
> " 'These public policy considerations, however, do not persuade me that the law imposes *no* duty of good faith performance.'
>
> "*Vincent v. Blue Cross-Blue Shield of Alabama.* (Emphasis added.)

"The dissent in *Vincent*, set out in pertinent part below, further reflects the inherent policy considerations mandating our recognition of a redressable tort for intentional breach of good faith.

> " 'Public policy favors the free exercise of rights arising from a contract by the parties to it.
>
> " 'However, this is not to say that an insurer may in bad faith breach his contract with impunity. The law will not allow an insurer to wilfully refuse to evaluate or honor a claim with the knowledge that the avowed purpose of the insurance contract was to protect the insured at his weakest and most perilous time of need.' "

405 So.2d at 6.

The *Chavers* test was refined and clarified in *Gulf Atlantic Life Ins. Co.* v. *Barnes*, 405 So.2d 916, 924 (Ala. 1981):

> "The first trier of the test promulgated by Mr. Justice Embry and adopted by this Court in *Chavers* establishes that the tort of bad faith refusal to honor a direct claim arises when there exists 'no lawful basis for the refusal coupled with actual knowledge of that fact.' 'No lawful basis,' as ex-

pressed in that opinion, means that the insurer lacks a legitimate or arguable reason for failing to pay the claim. See *Michael v. National Security Fire & Casualty Co.*, 458 F.Supp. 128 (N.D.Miss. 1978). That is, when the claim is not fairly debatable, refusal to pay will be bad faith and, under appropriate facts, give rise to an action for tortious refusal to honor the claim. *Anderson v. Continental Insurance Co.*, 85 Wis.2d 675, 271 N.W.2d 368 (1978). When a claim is 'fairly debatable,' the insurer is entitled to debate it, whether the debate concerns a matter of fact or law. 'Coupled with actual knowledge of that fact' implies conscious doing of wrong. Bad faith, then, is not simply bad judgment or negligence. It imports a dishonest purpose and means a breach of known duty, i.e., good faith and fair dealing, through some motive of self-interest or ill will.

"The second tier of the test is an elaboration on the first. The trier of fact, by finding, on the part of the insurer, an 'intentional failure to determine whether or not there was any lawful basis for refusal,' may use that fact as an element of proof that no lawful basis for refusal ever existed. The relevant question before the trier of fact would be whether a claim was properly investigated and whether the results of the investigation were subjected to a cognitive evaluation and review. Implicit in that test is the conclusion that the knowledge or reckless disregard of the lack of a legitimate or reasonable basis may be inferred and imputed to an insurance company when there is a reckless indifference to facts or to proof submitted by the insured. Of course, if a lawful basis for denial actually exists, the insurer, as a matter of law, cannot be held liable in an action based upon the tort of bad faith. Otherwise, the insurer's knowledge of the non-existence of any debatable reasons for refusal would be a question for the finder of fact, i.e., the jury."

Gulf Atlantic's instructions evidence this Court's initial concern that the existence *vel non* of bad faith must not be determined in a vacuum, but under the circumstances existing at the time the insurer denied the claim.

The elements of a bad faith claim were summarized in *National Security Fire & Cas. Co. v. Bowen*, 417 So.2d 179, 183 (Ala. 1982), as follows:

> "An insurer is liable for its refusal to pay a direct claim when there is no lawful basis for the refusal coupled with actual knowledge of that fact. *Chavers v. National Security Fire Ins. Co., Ala.*, 405 So.2d 1 (1981). No lawful basis 'means that the insurer lacks a legitimate or arguable reason for failing to pay the claim.' *Gulf Atlantic Life Ins. Co. v. Barnes*, Ala., 405 So.2d 916 (1981). When a claim is 'fairly debatable,' the insurer is entitled to debate it, whether the debate concerns a matter of fact or law. *Ibid.*
>
> "Under those authorities the plaintiff in a 'bad faith refusal' case has the burden of proving:
>
> "(a) an insurance contract between the parties and a breach thereof by the defendant;
>
> "(b) an intentional refusal to pay the insured's claim;
>
> "(c) the absence of any reasonably legitimate or arguable reason for that refusal (the absence of a debatable reason);
>
> "(d) the insurer's actual knowledge of the absence of any legitimate or arguable reason;
>
> "(e) if the intentional failure to determine the existence of a lawful basis is relied upon, the plaintiff must prove the insurer's intentional failure to determine whether there is a legitimate or arguable reason to refuse to pay the claim.

> "In short, plaintiff must go beyond a mere showing of nonpayment and prove a *bad faith* nonpayment, a nonpayment wthout any reasonable ground for dispute. Or, stated differently, the plaintiff must show that the insurance company had no legal or factual defense to the insurance claim." (Emphasis in original.)

Following the decisions in *Chavers*, *Barnes*, and *Bowen*, this Court established what is now known as the "directed verdict on the contract claim standard" in bad faith cases. See *Burkett v. Burkett*, 542 So.2d 1215, 1218 (Ala. 1989). Writing for the Court in *National Savings Life Ins. Co. v. Dutton*, 419 So.2d 1357, 1362 (Ala. 1982), Justice Shores stated:

> "As noted by both sides in this case, the tort of bad faith refusal to pay a valid insurance claim is in the embryonic stage, and the Court has not had occasion to address every issue that might arise in these cases. In [*National Security Fire & Cas. Co. v. Bowen*], we set out the elements of the tort and attempted to show the plaintiff's burden in these cases. It is a heavy burden. In the normal case in order for a plaintiff to make out a prima facie case of bad faith refusal to pay an insurance claim, the proof offered must show that the plaintiff is entitled to a directed verdict on the contract claim and, thus, entitled to recover on the contract claim as a matter of law. Ordinarily, if the evidence produced by either side creates a fact issue with regard to the validity of the claim and, thus, the legitimacy of the denial thereof, the tort claim must fail and should not be submitted to the jury."

The *Dutton* Court's characterization of a plaintiff's burden of proof as a "heavy" one was no doubt prompted by the Court's previous recognition in *Chavers* of the necessity for allowing insurers a broad range of freedom to thoroughly evaluate claims and to decline payment in non-

meritorious cases. However, keenly aware of the fact that there were countervailing policy considerations that weighed in favor of an insured's right to have his claim properly evaluated and promptly paid by the insurer, the *Dutton* Court, in articulating the standard to be applied in "normal" or "ordinary" bad faith cases, allowed for a different standard to be applied in certain unusual or extraordinary cases. Justice Jones, concurring specially in *Dutton*, elaborated on the majority's opinion:

> "I concur completely with the opinion and write separately to elaborate on one point. The opinion correctly prefaces the 'directed verdict on the contract claim' standard with the words 'In the normal case'; and the phrase 'if the evidence produced . . . creates a fact issue . . .' is preceded by the word 'Ordinarily.' These are significant qualifications. Certainly, extreme cases will arise in which a fact issue will present a jury question on that claim. This is not the case before us; and, absent such circumstances, the 'directed verdict on the contract claim' is the applicable standard for testing the tort of bad faith claim."

Later, Justice Jones, in his opinion concurring specially in *Safeco Insurance Co. of America v. Sims*, 435 So.2d 1219, 1224 (Ala. 1983), wrote:

> "This 'directed verdict on the contract claim' test is not to be read as requiring, in every case and under all circumstances, that the tort claim be barred unless the trial court has literally granted plaintiff's motion for a directed verdict on the contract. Indeed, the words '*entitled* to a directed verdict' so indicate. Rather, this test is intended as an objective standard by which to measure plaintiff's compliance with his burden of proving that defendant's denial of payment was without any reasonable basis either in fact or law; i.e., that defendant's defense to the contract

claim is devoid of any triable issue of fact or reasonably arguable question of law.

"Exceptions to the 'directed verdict' rule will undoubtedly arise. Take the case where the insurer insists that its refusal of payment was grounded solely on a particular entry in a hospital record, and plaintiff denies the very existence of such an entry. Merely because the insurer may be able to withstand a directed verdict motion—the existence *vel non* of the record entry itself being an issue of fact—would not, as a matter of law, bar the plaintiff's tort claim. This extreme example is to be distinguished from the more normal situation in which the factual dispute centers around the reasonable, but conflicting, inferences that may be drawn from a hospital record entry. If the entry in fact exists and one of the reasonable inferences of fact which may be drawn therefrom supports a legal basis for denial of the claim, Plaintiff would not be entitled to a directed verdict on the contract claim; thus, the claimant would be barred from proceeding with his tort of bad faith claim, even though the issue of fact may be resolved adversely to the insurer and the contract benefits awarded to the insured.

"Because of its potential relevance, one additional exception to the 'directed verdict' test is suggested: Take the case of the insurer whose refusal of payment is based solely upon a legal position with respect to the controlling principles of law and its application to the undisputed facts giving rise to the claim. While the insurer, under the guise of asserting a legitimate defense, could not be heard to take issue with clear, well settled, elementary principles of contract law, certainly the rule of reasonableness dictates a field of operation for a denial of benefits based upon arguable legal grounds which are fairly debatable, even though the trial judge may correctly reject such arguments and direct a verdict for the insured.

> "Thus, as we have seen, *Dutton*'s use of the terms 'In the normal case' and 'Ordinarily' allows for exceptions to the 'entitled to a directed verdict' test. In the first example, the insured may proceed with his bad faith claim even though he was not entitled to a directed verdict; and in the second example, the insurer would be entitled to a judgment on the tort claim even though the insured was entitled to a directed verdict on the contract claim. Certainly these rare exceptions will not be difficult to recognize, nor will the general rule, because of rare exceptions, be difficult to apply." (Emphasis in original.)

Indeed, this Court was later confronted with cases in which the "directed verdict on the contract claim standard" was deemed inapplicable and the insurers were not permitted to avoid bad faith liability by putting on evidence sufficient to defeat the plaintiffs' motions for a directed verdict on the contract claims. In *Continental Assurance Co. v. Kountz*, 461 So.2d 802 (Ala. 1984), this Court stated that even if the plaintiff had not been entitled to a directed verdict on the contract claim, the bad faith claim would have been properly submitted to the jury. The Court in *Kountz* determined from the evidence presented at trial that the insurer intentionally failed to investigate the claim sufficiently to determine the existence of a valid reason for denying payment (i.e., the insurer failed to determine that the reason for the removal of the plaintiff's teeth was an injury, as claimed, not the pre-existing chronic periodontal disease). See, also, *Aetna Life Ins. Co. v. Lavoie*, 505 So.2d 1050 (Ala. 1987). In both *Kountz* and *Aetna*, the Court, quoting *Gulf Atlantic Life Ins. Co. v. Barnes*, supra, recognized that an intentional failure on the part of an insurer to determine whether there was a lawful basis for denying a claim could be established with proof that the insurer either intentionally or recklessly failed to properly investigate the claim or to subject the results of the investigation to a cognitive evaluation and review. In *Aetna*, the

Court stated: "Considering the fact that the decision to deny [the claim] was made without the benefit of 'critical' sections of the medical file, the jury could find that the claim was not 'properly investigated,' and that there was a 'reckless indifference to facts or to proof.'" 505 So.2d at 1053. See, also, *Blue Cross & Blue Shield of Alabama v. Granger*, 461 So.2d 1320 (Ala. 1984), and *Carter v. Old American Ins. Co.*, 544 So.2d 917 (Ala. 1989).

In *Jones v. Alabama Farm Bureau Mutual Casualty Co.*, 507 So.2d 396 (Ala. 1987), the plaintiffs had a homeowner's policy that insured against damage caused directly by perils such as lightning, but not against damage caused indirectly, such as from a tree falling on the power line. During a storm the plaintiffs experienced problems with their electrical service, and several items of personal property were damaged. The plaintiffs and Alabama Farm Bureau Mutual Casualty Company ("Farm Bureau") disputed whether the damage was caused directly by a lightning strike or by a power surge when a tree limb fell on the power line. A Farm Bureau adjuster claimed that the plaintiff told him that the damage resulted when a tree limb fell on the power line. The adjuster's decision was based solely on what the plaintiff allegedly had told him. Farm Bureau argued that the factual dispute as to what the plaintiff had told the adjuster in the conversation precluded a directed verdict in favor of the plaintiff in the breach of contract action, and, therefore, under *Dutton* entitled Farm Bureau to a summary judgment on the bad faith claim. However, we held:

> "The instant case is not the normal or ordinary case. As stated previously, the sole basis for the initial denial of Mrs. Jones's claim by Mr. Kratzer was Mr. Jones's alleged statement to Kratzer. It is the resolution of this factual issue, alone, that will determine the viability of Mrs. Jones's bad faith claim. Clearly, if Mr. Jones told Mr. Kratzer that

lightning struck the house and that a tree limb fell on the service entrance line shortly thereafter, and that the damage to the service entrance line was the cause of limb damage to the personal property, then Kratzer could have an arguable reason for summarily denying coverage. On the other hand, if Mr. Jones told Mr. Kratzer that he believed that the damage was caused by lightning, Mr. Kratzer would be under a duty to determine whether there was, in fact, any lawful basis for the denial of the claim. A simple examination of the personal property to determine the cause of damage would be sufficient.

"Although the plaintiff's burden of proof in a bad faith action is great, it should not be insurmountable. Precluding a plaintiff's bad faith action by application of the 'directed verdict on the contract claim' test when the disputed factual issue arises solely from a contradicted oral conversation between the insurer and the insured or a third person puts too onerous a burden on the plaintiff. Moreover, it would frustrate the purpose of the bad faith action by allowing an insurer simply to misrepresent the content of an oral conversation to avoid liability."

507 So.2d at 400-01.

In *United American Ins. Co. v. Brumley*, 542 So.2d 1231 (Ala. 1989), the insurer failed to pay the insured's claim under a "Medicare supplement" policy that read as follows:

"[I]f you have not established entitlement to hospital and/or medical insurance benefits under Medicare, we will pay the benefits provided under this policy as though you had established entitlement."

The insured, who was 64 years old, was not covered by Medicare at the time he submitted his claim. This Court held that the bad faith claim had been properly submitted to the jury, stating, in pertinent part, as follows:

> "United American substantially asserts that it did not receive until June 7, 1985, the bills or letters or calls from Mr. Brumley or Hill or Green. 'Although the plaintiff's burden in a bad faith action is great, it should not be insurmountable.' [*Jones v. Alabama Farm Bureau Mutual Casualty Co.*] at 401. To preclude Mr. Brumley's bad faith action by application of the 'directed verdict on the contract' requirement, when the allegedly disputed factual issues arise solely from the statements of United American, would put too onerous a burden on Mr. Brumley. The policy noted in *Jones* is present here: it would frustrate the purpose of the bad faith action to allow an insurer to prevent a bad faith claim from going to the jury by feigning ignorance of the claim or misrepresenting the content of oral or written communications. Accordingly, we hold that the trial court did not violate the 'directed verdict on the contract' requirement of bad faith claims by submitting the bad faith claim to the jury. Indeed, a directed verdict on the contract claim might well have been appropriate under these facts, but we need not reach that question."

542 So.2d at 1235-36.

As we stated earlier in this opinion, neither Ms. Thomas nor Principal Mutual was entitled to a judgment as a matter of law on the breach of contract claim. A fact question existed as to whether Ms. Warren was a "dependent" under the policy at the time of her death (i.e., a fact question existed as to whether she was "attending school on a full-time basis"). Ordinarily, if the evidence produced by either side creates a fact question with regard to the contract claim, the bad faith claim must fail. Ms. Thomas argues, however, that even if the trial court did not err in submitting the contract claim to the jury, this case does not fall within the category of a normal bad faith case. Rather, she argues, this is an extraordinary case where the "directed verdict on the contract claim

standard" could not be applied. Principal Mutual takes the contrary position—that there is nothing extraordinary about this case.

After carefully reviewing the record, we conclude that this case is not the "normal" or "ordinary" case to which the "directed verdict on the contract claim" standard is applicable. The evidence presented at trial persuades us that this case falls within the category of an extraordinary case, in which it would not be appropriate to allow the insurer to obtain a judgment as a matter of law on the bad faith claim by putting on evidence sufficient to defeat the plaintiff's motion for a directed verdict on the contract claim.

The record reveals that at the time she made her initial recommendation to deny Ms. Thomas's claim, Ms. Robbins was aware that the only reason Ms. Warren had stopped attending the Mobile Academy was "because she was sick." Ms. Robbins's notation in the claim file indicates that she knew that Ms. Warren had undergone extensive chemotherapy treatments, had been in the hospital on numerous occasions, and had been completely bedridden for approximately six months immediately preceding her death. Ms. Robbins testified at trial that she based her recommendation on the information that had been given to her by Ms. Rehm. Ms. Robbins further testified that it was her understanding that Ms. Warren was neither enrolled in nor attending school at the time of her death and had not been for approximately 18 months prior thereto. Ms. Robbins also testified at trial that, in her opinion, Ms. Warren was not "attending school on a full-time basis," and, thus, that she was not a "dependent" at the time of her death. However, portions of Ms. Robbins's deposition testimony were admitted at trial. The following is an excerpt from that testimony:

> "Q. Okay. When did [Principal Mutual] consider that she no longer qualified as being an insured, a de-

pendent? Just give me a date and I will move on to something else.

"(No reply)

"Q. You can't give me a date?

"A. No.

"Q. But you know that as of the date of her death there was no coverage?

"A. Correct.

"Q. What's the basis of that opinion?

"A. She was not attending school on a full time basis.

"Q. Okay. But you told us that if she had paid the tuition in advance and had been—You have already answered that. If, instead of contracting cancer, she had been involved in an automobile accident through this entire period of time and had been bedridden in a coma, would you have paid the benefits under those circumstances for Melinda Warren? She was a full time student just as your notes say there in September of 1985 and she's involved in an automobile accident that puts her in a coma. Would you have denied benefits in this case? It occurred while she was a full time student.

"A. I would have recommended they consider paying the claim.

"Q. So, you make a distinction between an automobile accident and an illness?

"A. She was—You are saying she was in a coma?

"Q. Yes. Bedridden in a coma. You would have recommended—

"A. And she was attending school on a full time basis at the time of the accident?

"Q. Yes.

"A. And she did not die until March of 1987?

"Q. Right.

"A. But the accident was in September of 1985?

"Q. Yes.

"A. I would have recommended that we consider paying the claim.

"Q. Your recommendation would have been just the opposite of what it was?

"A. Yes.

"Q. Okay. Why do you make a distinction between an illness and an accident?

"A. I am not making a distinction between an illness and an accident. She was in a coma.

"Q. Which made her physically incapable of attending classes?

"A. It would have made her—

"Q. All right. Do you think Melinda Warren was physically capable of attending classes?

"A. I don't know.

"Q. Would that have influenced your decision?

"A. If she had been physically capable?

"Q. Yes. Physically incapable.

"A. Incapable?

"Q. Yes.

"A. Yes, it would have had an effect on my decision.

"Q. You told us that you knew she had ovarian cancer. She was receiving chemotherapy. She was bedridden from some time in October or early No-

vember. Didn't you know those things when you denied this claim?

"A. She was—I knew she was bedridden six months before she died.

"Q. Well, I am asking you just to assume that this girl was so sick that she couldn't do anything after September of 1985. Just assume that to be the case, that she was too sick to attend school. Would that have altered your decision—I am sorry. Would that have altered your decision as to whether or not to pay this claim?

"A. It would have had an effect on my decision.

"Q. In what way?

"A. If she was too sick to attend school and you are saying that we are using—

"Q. She was too sick to attend school after her last full time attendance. And if that is the case, don't you think her mother should have received the death benefits, if that was the case?

". . . .

"Q. I will ask you to assume September. But after September she was physically too ill to attend clases. If that had been the facts of this case, then, in your opinion, she should have received the death benefits or her mother should have. Isn't that correct?

"A. I guess I would have recommended if she was physically incapable of getting up and attending school—if she was bedridden, I would have recommended to pay.

". . . .

"Q. You would have recomemnded that she be paid?

"A. If she was bedridden from September '85 through her death.

"Q. Don't you think it fair and reasonable to determine the eligibility and that is whether or not they are attending school on a full time basis as of the date of the accident or as of the date of the illness as opposed to the time of death?

"MS. HARE: Objection.

"Q. Isn't that the only fair and reasonable way to interpret the provisions of this policy?

"THE COURT: Overruled. Both objections overruled.

"A. Every case is different.

"Q. Well, isn't that the fairest way to interpret this definition if they are—

". . . .

"Q. If they are a full time student on the day they become stricken by a fatal illness or involved in a catastrophic accident. That should determine their eligibility as to whether or not they are entitled to death benefits shouldn't it?

"MS. HARE. Objection.

"Q. As opposed to whether or not they lived three months or six months or two years or are bedridden or in a coma. The eligibility should be determined as of the date of the accident or the contraction of the illness.

"MS. HARE: Objection.

"Q. You agree with that?

"MS. HARE: Objection. She has already told you, John, that that's one consideration. But, no, that's not the only thing they look at.

"Q. Do you agree with that?

"A. Yes.

"MS. HARE: Objection."

The jury could have inferred from this testimony that Ms. Robbins was confused as to whether Ms. Thomas was entitled to recover under the policy. Based upon the information that she placed in the claim file, the jury also could have found that had Ms. Robbins carefully reviewed the claim, she would have realized that Ms. Warren had to withdraw from school after September 1985 because she was physically incapable of attending classes. Viewing the evidence in a light most favorable to Ms. Thomas, as we are required to do, we think that the jury could have reasonably found from all of the evidence (i.e., the information in the claim file, the rule prohibiting a narrow and unreasonable interpretation of policy language that was contained in the claims manual, and the custom or practice within the insurance industry of paying such claims) that, at the time she made her initial recommendation to deny the claim, Ms. Robbins simply failed to subject the results of her investigation (i.e., the information accumulated in the claim file) to a cognitive evaluation and review.

Mr. Wallace testified at trial that he carefully reviewed Ms. Thomas's claim and that he denied it because the claim file indicated that Ms. Warren was not enrolled in and did not attend the Mobile Academy after September 1985. However, portions of his deposition testimony were also admitted into evidence at trial. The record shows the following:

> "Q. Mr. Wallace, what happened in this file, to be honest, is that the recommendations of these claims people came to you and you just rubber stamped it didn't you?
>
> "A. I never do that on a claim.
>
> "Q. You didn't even really know or appreciate the fact that she was not able to physically attend school did you?
>
> "A. I knew the dates that were involved here and how long a time had lapsed since she had been not

only attended [sic] but had not been enrolled in school when I made my determination.

"Q. Well, on page 14 of your deposition when I asked you about that, do you remember the question? Question: 'It wouldn't have made any difference to you as to the cause of her inability to physically to be at class on the date of her death, would it?' Answer: 'Had we been told that based on the information, you know, I would have taken that into account, certainly.' Wasn't that your answer?

"(No audible response.)

"Q. And then the next question—

"A. Could I answer it?

"Q. Oh, yes.

"A. I would have taken that into consideration, the cause of her disability.

"Q. But you said, 'had we been told that based on the information, you know, I would have taken that into account, certainly.' That indicates that you didn't; but if you had known it, you would have, doesn't it?

"A. Well, it was in the claim file.

"Q. Yes. But you didn't read the claim file did you? You just rubber stamped what the people under you sent up?

"A. I wouldn't have done that.

"Q. Well, doesn't this indicate that you didn't know that she was physically unable to attend class?

"A. It just said—I think I took this—You said the cause of her inability to physically be able to attend class. It doesn't talk about her—

"Q. Go ahead.

"A. I would have taken into account the cause of her disability, yeah.

"Q. But you didn't?

"A. Uh-huh.

"Q. You didn't at the time you rubber stamped the recommendation of the people under you, did you?

"A. I maybe—I maybe would have taken that—I am sure I took it into consideration. But we are talking about 18 months here after—

"Q. Let's read the question again. Question: 'It wouldn't have made any difference to you as to the cause of her inability to physically be at class on the date of her death, would it?' Answer: 'Had we been told that based on the information, you know, I would have taken that into account, certainly.' Question: 'You would have?' Answer: 'On her inability to be in class?' Question: 'Yes.' Answer: 'That could have been part of my determination.' Question: 'Did you request a medical report?' Answer: 'No. Based on the medical in the file there didn't appear to be any need to do that.' Question: 'Did you think she was physically able to attend classes?' Answer: 'According to the information that I had when I initially denied it, she was not enrolled in school. So, there wasn't any reason to continue the investigation.' Question: 'So, you felt like she was not attending school on a full time basis because she was not enrolled?' Answer: 'I didn't feel that. I was told that.' Question: 'You were told that?' Answer: 'Uh-huh.' Question: 'Did you see the report from the Mobile Academy of Hair Design and from the State Department of Cosmetology that showed that she had re-enrolled in March of 1985?' Answer: 'That was not provided to us, no.' That was in the file wasn't it?

"A. Not when I saw it.

> "Q. Okay. Question: 'Did you ask for it?' Answer: 'I was told that she wasn't enrolled so I wouldn't have asked for it.' Question: 'Somebody told you that she wasn't enrolled at the time of her death and based on that you went along with the agreement to deny the claim?' Answer: 'That's correct.' And that's really what happened in this claim isn't it, Mr. Wallace?
>
> "A. I denied it because of the length of time that she wasn't enrolled in school, wasn't attending school on a full time basis."

Although he testified at trial that, in his opinion, Ms. Warren was not "attending school on a full-time basis" and, thus, that she was not a "dependent" at the time of her death, the jury could have reasonably inferred from his testimony that Mr. Wallace was also confused as to exactly what circumstances would warrant payment. In fact, viewing his testimony as a whole, we conclude that a fact question was presented as to whether Mr. Wallace carefully reviewed Ms. Thomas's claim, or, instead, simply "rubber stamped" the recommendations of Ms. Robbins and Ms. Davis. The credibility of both Ms. Robbins and Mr. Wallace was certainly a matter for the jury.

As previously noted, Ms. Davis and Mr. Kaplan appear to have steadfastly maintained that Ms. Warren lost her status as a "dependent" under the policy after September 1985, notwithstanding the fact that she was rendered physically incapable of attending classes by a terminal illness. We note that Ms. Ford did not testify. We also note that Mr. Wallace apparently did not participate in the second review of Ms. Thomas's claim.

The existence *vel non* of bad faith must not be determined in a vacuum, but under the particular circumstances of each case existing at the time the insurer denied the claim. The evidence in this case was such that the jury could have reasonably found: that Principal Mutual

contracted with the University to provide life insurance for its employees and their "dependents"; that the policy was payable upon the death of a "dependent," whether death was the result of an accident or an illness; that each claim submitted to Principal Mutual was reviewed on a case-by-case basis; that policy language was not always interpreted literally; that a manual promulgated by Principal Mutual and used by its claims examiners prohibited a narrow and unreasonable interpretation of the language of the policy; that according to the custom and practice within the insurance industry, Ms. Warren should have been considered to be a "dependent" within the meaning of the policy because she was rendered physically incapable of attending school by a debilitating illness that eventually caused her death; that at least two of the examiners who reviewed Ms. Thomas's claim, Ms. Robbins and Mr. Wallace, exhibited confusion as to exactly what circumstances would warrant payment within the context of this case; that all of the examiners involved in the review of the claim, including Ms. Davis and Mr. Wallace, apparently disregarded the claims manual and placed a narrow and restrictive interpretation on the policy language that was contrary to the interpretation generally placed on such language within the industry; and finally, and perhaps most importantly, that throughout the claims review process, Principal Mutual's examiners either intentionally or recklessly failed to subject the results of the investigation to a cognitive evaluation and review.

In the letter denying the claim, Ms. Robbins misstated the facts: "[Ms.] Warren was last on the role [sic] at school through September 1985. *She then became disabled* and died on March 10, 1987." (Emphasis supplied.) Principal Mutual's claim file showed: *"Only reason she wasn't in school beyond 9/85 was because she was sick."* It appears to use that Principal Mutual refused to believe what all of the evidence that it had before it showed—that Ms. Warren could not attend school from September

1985 until her death because she was dying of cancer. Ms. Warren's physician testified that he did not believe that Ms. Warren could physically attend school after June 1985. However, she did attend through August 1985. There was nothing to substantiate Principal Mutual's assertion that Ms. Warren became disabled after she had ceased attending school. To the contrary, all of the evidence showed that Ms. Warren stopped attending school because she was physically unable to attend.

All of this illustrates why this case falls within the category of unusual or extraordinary cases. If the "directed verdict on the contract claim standard" were applied, Principal Mutual would be allowed to obtain a judgment as a matter of law on the bad faith claim, even though a factual question was presented as to whether its claims examiners either intentionally or recklessly failed to subject the results of the investigation to a cognitive evaluation and review and, thereby intentionally failed to determine prior to denying the claim whether there was, in fact, a lawful basis for denial. This Court's decisions in *Aetna Life Ins. Co. v. Lavoie*, supra, and *Continental Assurance Co. v. Kountz*, supra, would not allow such a result. Furthermore, the very existence *vel non* of Principal Mutual's alleged lawful basis for denying Ms. Thomas's claim—that Ms. Warren was not a "dependent" within the meaning of the policy—is itself a question of fact only because of the testimony of employees of Principal Mutual (i.e., the examiners who reviewed the claim) as to the intent of the policy. Under these circumstances, the "directed verdict on the contract claim standard" did not bar the jury's consideration of the bad faith claim. See *United American Ins. Co. v. Brumley*, supra, and *Jones v. Alabama Farm Bureau Mutual Casualty Co.*, supra. For the foregoing reasons, we hold that the trial court erred in entering a judgment notwithstanding the verdict for Principal Mutual on the bad faith claim.

We note that because the trial court entered a judgment as a matter of law for Principal Mutual on the bad faith claim, it was unnecessary for it to consider whether the $750,000 damages award was excessive, an issue that was raised by Principal Mutual in its post-judgment motion. Any future consideration of this issue should be in accordance with *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986), and *Green Oil Co. v. Hornsby*, 539 So.2d 218 (Ala. 1989).

88-834 REVERSED AND REMANDED WITH DIRECTIONS.

88-925 AFFIRMED.

Hornsby, C.J., and Jones and Adams,* JJ., concur.

Almon, Steagall, and Kennedy, JJ., concur in the result.

Maddox, J., concurs in part and dissents in part.

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* Justice Adams did not sit at oral argument, but has listened to the audio tape of the arguments.

MADDOX, JUSTICE (concurring in part; dissenting in part).

Mr. Justice Almon, in a dissenting opinion in *Chavers v. National Sec. Fire & Cas. Co.*, 405 So.2d 1 (Ala. 1981), said the following about the new tort of bad faith refusal to pay an insurance claim established in that case:

> "Setting aside for the moment the facts,—or—I should say the lack of facts, in this case and my personal views on the tort of bad faith, I have serious questions concerning the majority's opinion. According to the test adopted by the majority, 'an actionable tort arises for an insurer's intentional refusal to settle a direct claim where there is either "(1) no lawful basis for the refusal coupled with actual knowledge of that fact or (2) intentional failure to determine whether or not there was any lawful basis for such refusal."' The majority fails, however, to establish the parameters of this tort by not defining what constitutes a 'lawful basis.'
>
> "* * * *
>
> "I . . . question the reach of the majority's opinion. Although couched in terms of an insurer's breach of its duty of good faith and fair dealing, the language of the opinion, as well as the authority relied upon to justify the recognition of the tort, is arguably broad enough to imply this duty in every contractual relationship."

405 So.2d at 15.

Today's opinion by the Court confirms the fears expressed by Mr. Justice Almon in the *Chavers* case, and once again authorizes the recovery of punitive damages against an insurer for failing to pay a claim that was seriously disputed, the validity of which has only *finally been determined today in this appeal.* To authorize the recovery of punitive damages in such a factual setting, in my opinion, is a misapplication of the law of contracts,

and effectively allows for the recovery of punitive damages against an insurer without affording the insurer due process of law. The majority's conclusion that this case "falls within the category of an unusual or extraordinary case" tends to confirm what Mr. Justice Almon pointed out his dissent in *Chavers*—that there are no "parameters" or boundaries for the tort. I believe that the opinion expands the tort of bad faith and does not correctly state the law of contracts, the reasonable expectancies of the parties under such contracts, and the damages that can be awarded in cases of a breach. Consequently, I am compelled to dissent once again, as I have done over the years since the tort of bad faith was recognized.[2] I hesitate to continue to express a dissenting view, but I am convinced that, under the facts of this case, the trial judge was correct in granting the insurer's motion for judgment notwithstanding the verdict, and I am especially troubled by the holding, which allows the recovery of punitive damages for an insurer's failure to pay a claim that has only today been judicially determined to be a valid claim.

My view of the law in this area has been expressed in several dissenting and special concurring opinions. In *Aetna Life Ins. Co. v. Lavoie*, 505 So.2d 1050 (Ala. 1987), I spelled out in some detail in a special concurrence my views on the tort of bad faith refusal to pay an insurance claim, and I attempted to state my view of the law of insurance contracts and the failure to pay claims and how the matter could best be handled in view of the public policy considerations involved. I also stated in that special concurrence the reasons for the dissents I had previously filed in bad faith cases. I do not restate those views here, but refer the reader to that special

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[2] See my dissenting opinions in *Gulf Atlantic Life Ins. Co. v. Barnes*, 405 So.2d 916, 924 (Ala. 1981), and *Continental Assurance Co. v. Kountz*, 461 So.2d 802 (Ala. 1984).

concurrence. I still believe the views I expressed there to be legally correct.[3]

Even though my view of the law of insurance contracts has not received much following, and even though the legislature has not seen fit to enter the field of regulating the new tort except to pass legislation setting a cap on the recovery of punitive damages, I continue to believe that the legislature is the proper body to resolve the public policy questions surrounding these controversies and that the tort of bad faith failure to pay is an inappropriate method for resolving the public policy issues.

Accepting the fact that this Court has established the tort of bad faith failure to pay an insurance claim, I cannot accept the conclusion of the majority that this case "falls within the category of an unusual or extraordinary case." In my opinion, this case is no different from the ordinary case in which there is a dispute about insurance coverage. Because of that fact, I am convinced that the plaintiff should not be permitted to recover punitive damages in any amount, and certainly not in the sum of $750,000. I was almost convinced that the trial court was incorrect in denying the insurer's motion for judgment notwithstanding the verdict on the contract claim, on the ground that the evidence showed that the dependent was not enrolled in school on the date of her death, but there was evidence that the contract language was ambiguous and that reasonable persons could disagree on the question of coverage. Does that mean that punitive damages should be allowed? I think not.

The issue of coverage was disputed from the beginning and was only *finally* resolved by this Court today; therefore, the trial judge did not err in granting the insurer's

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[3] I joined in the disposition of that particular case because of the peculiar facts that surrounded it, as my special concurrence shows.

motion for judgment notwithstanding the verdict. Consequently, I must respectfully disagree with the Court's holding that a jury question was presented on the bad faith claim. Also, to allow the recovery of $750,000 in punitive damages, *under the facts of this case*, has serious "due process" implications, especially in view of the fact that there are not set parameters for determining when such damages are recoverable and what will be the "unusual or extraordinary" case. See my dissent in *Pacific Mutual Life Ins. Co. v. Haslip*, 553 So.2d 537, 544 (Ala. 1989).

Based on the foregoing reasons, I concur in the judgment in Case No. 88-925, but I dissent in Case No. 88-834.

APPENDIX D

JUDGE JOHNSTONE

BARBARA CAROLINE THOMAS

vs

PRINCIPAL FINANCIAL GROUP, ETC.

Date	Page No. 5 ACTIONS(Continued)	Case Number
		CV 87-002561-DIJ ID YR NUMBER
1-12-89	Receipt of Attorneys for Trial Exhibits.	
1-26-89	Defts motion for judgment notwithstanding the verdict or in the alternative, motion new trial March 3, 1989—Judgment notwithstanding the verdict denied as to contract; granted as to bad faith.	
3-20-89	Pltff's motion for Court to reconsider its order granting the defts' motion for judgment notwithstanding of the verdict April 7, 1989—Submitted April 7, 1989—Denied MO/attys;ocp	

APPENDIX E

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

August 9, 1991

1900294

PRINCIPAL FINANCIAL GROUP, d/b/a
PRINCIPAL MUTUAL LIFE INSURANCE COMPANY

v.

BARBARA CAROLINE THOMAS

Mobile Circuit Court CV-87-002561

The appellant having filed a motion for stay of issuance of the certificate of judgment in this cause pendng disposition of the matter in the U.S. Supreme Court, and said motion having been duly submitted and considered by the court,

IT IS ORDERED AND ADJUDGED that said motion for stay of issuance of the certificate of judgment in this cause be, and the same is hereby, denied.

Hornsby, CJ., Almon, Shores, Adams, Houston, Steagall, Kennedy and Ingram, JJ., concur;

Ingram, JJ., concur;

Maddox, ., dissents.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the Instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 9th day of Aug. 1991

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

APPENDIX F

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, DC 20543

August 16, 1991

WILLIAM K. SUTER
Clerk of the Court

Mr. Andrew L. Frey
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, DC 20006-1885

Re: Principal Financial Group, etc.,
v. Barbara Caroline Thomas
Application No. A-117

Dear Mr. Frey:

The application for a stay of issuance of certificate of judgment in the above-entitled case has been presented to Justice Kennedy, who on August 16, 1991 endorsed thereon the following:

"Deny
AMK
8/16/91"

Very truly yours,

WILLIAM K. SUTER
Clerk

By /s/ Christopher W. Vasil
CHRISTOPHER W. VASIL
Deputy Clerk

NOTE—FOR YOUR INFORMATION: A copy of this letter has been sent to all interested parties shown on the attached notification list.

NOTIFICATION LIST

Mr. Andrew L. Frey
Mayer, Brown & Platt
2000 Pennsylvania Avenue, N.W.
Washington, DC 20006-1885

Mr. Andrew T. Citrin
Cunningham, Bounds, et al.
Post Office Box 66705
Mobile, AL 36660